



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

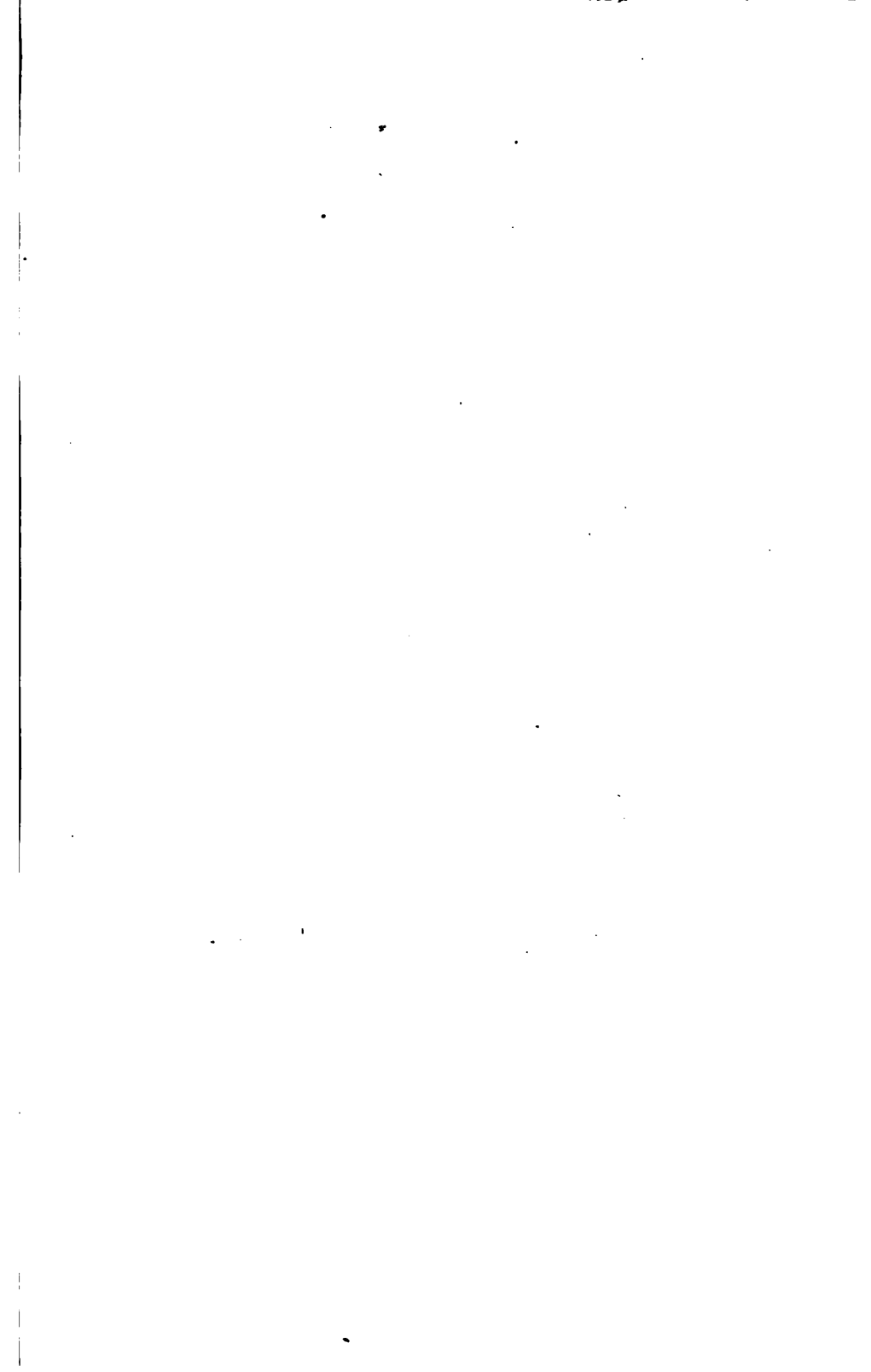
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



HARVARD LAW LIBRARY

Received APR 12 1918







REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-
BOOKS CITED, STATUTES CITED AND CONSTRUED,
AN INDEX, AND NOTES TO THE
REPORTED CASES.**

WILL H. ADAMS,
OFFICIAL REPORTER

WILBUR G. CARPENTER,
CONNOR D. ROSS,
LUCY H. WILHELM,
Assistants.

VOL. 62.

FORT WAYNE PRINTING COMPANY
CONTRACTORS FOR STATE PRINTING AND BINDING
1916

Copyright, nineteen hundred seventeen
BY THE STATE OF INDIANA
In the office of the Librarian of Congress at Washington, D. C.

APR 12 1918

JUDGES

OF THE

APPELLATE COURT

OF THE

STATE OF INDIANA

WHOSE OPINIONS ARE CONTAINED IN THIS VOLUME.

HON. JOSEPH G. IBACH.*¶
HON. FRED S. CALDWELL.§††
HON. MILTON B. HOTTEL.¶**
HON. EDWARD W. FELT.†¶
HON. JAMES J. MORAN.†
HON. JOSEPH H. SHEA.††
HON. JOHN C. McNUTT.§§

*Chief Justice, November Term, 1915.

§Chief Justice, May Term, 1916.

**Presiding Judge, May Term, 1916.

†Presiding Judge, November Term, 1915.

†Appointed February 10, 1915.

††Elected in 1912

††Appointed September 1, 1913, and elected in 1914.

¶Elected in 1910, and reelected in 1914.

§§Appointed April 28, 1916.

OFFICERS
OF THE
APPELLATE COURT

**ATTORNEY-GENERAL,
EVAN B. STOTSENBURG**

**REPORTER,
WILL H. ADAMS**

**CLERK,
J. FRED FRANCE**

**SHERIFF,
HARRY W. PEMBERTON**

**LIBRARIAN,
W. CARY CARSON**

CASES REPORTED

A

Adams, Alsmeyer v.....	219
Allen, New York, etc., R. Co. v.....	391
Alsmeyer v. Adams.....	219
Ault v. Clark.....	55

B

Baltimore, etc., R. Co. v. Dun- can.....	161
Bolds, Gilbert v.....	595
Boyer v. Boyer.....	73
Bradford, Keeley v.....	683
Brown, Gibson v.....	460
— v. Young.....	364
Bryson v. Crown Oil Co.....	696
Butler v. City of Kokomo....	519

C

Carnithan, Indiana Life En- dowment Co. v.....	567
Carr, Hitt v.....	80
City of Indianapolis v. Lamkin	125
— v. Pell.....	191
City of Kokomo, Butler v....	519
City of Valparaiso, Windle v..	342
Clark, Ault v.....	55
Coca Cola Bottling Co. v. In- ternational Filter Co.....	421
Cook, Helms v.....	629
Coquillard v. Coquillard.....	428
— v. —.....	489
Creviston, Osterhaus v.....	382
Crouch v. Shantz.....	476
Crown Oil Co., Bryson v.....	696

D

Deep Vein Coal Co. v. Rainey.	608
DeMoss, Studebaker Bros. Mfg. Co. v.....	635
Duncan, Baltimore, etc., R. Co. v.....	161
Dunten, Shull v.....	602

E

Evans v. Seevers.....	20
-----------------------	----

F

Ferguson, Willis v.....	563
Fiscus, Smith v.....	156

Fites v. Fites.....	396
Fletcher, Hollander v.....	149
Frankfort Construction Co. v. Meneely.....	514

G

Garrison v. Miller.....	485
Gates, Miller v.....	37
Gibson v. Brown.....	460
Gilbert v. Bolds.....	595
Gladieux v. Johns.....	338
Globe, etc., Ins. Co. v. Indiana Reduction Co.....	528
Graves v. Kelly.....	164
Greer-Wilkinson Lumber Co., Harris v.....	697
Grocers' Chemical Works, Kessler v.....	377
Gruhl, Harker v.....	177

H

Haller, Koehler v.....	8
Hapner, Tieben v.....	650
Harker v. Gruhl.....	177
Harris v. Greer-Wilkinson, Lumber Co.....	697
— v. International, etc., Constr. Co.....	64
— v. Rogers.....	696
— v. Routh.....	696
Helms v. Cook.....	629
Hilborg, Nordyke & Mar- mon Co. v.....	196
Hillel v. Julius H. Buettner Furn., etc., Co.....	481
Hitt v. Carr.....	80
Hollander v. Fletcher.....	149
Hopkins v. Matters.....	676
Horner, Robinson v.....	456
Horodesky, Joseph v.....	1
Hunter, Terre Haute, etc., Traction Co. v.....	399

I

Indiana Life Endowment Co. v. Carnithan.....	567
Indiana Reduction Co., Globe, etc., Ins. Co. v.....	528
Indiana Quarries Co. v. Small- wood.....	33
International, etc., Constr. Co., Harris v.....	64
International Filter Co., Coca Cola Bottling Co. v.....	421

J

Johns, Gladioux v.....	338
Johnson v. Jones.....	4
—, Walker v.....	550
Jones, Johnson v.....	4
Joseph v. Horodesky.....	1
Julius H. Buettner Furn., etc., Co., Hillel v.....	481

K

Kaiser v. Wittekindt.....	171
Keeley v. Bradford.....	683
Kelly, Graves v.....	164
Kessler v. Grocers' Chemical Works.....	377
Koehler v. Haller.....	8

L

Lake Erie, etc., R. Co. v. McConkey.....	447
Lamkin, City of Indianapolis v.....	125
Leach v. Webb.....	693
Loewy, Stodola v.....	695
Lowe, Williams v.....	357

M

McConkey, Lake Erie, etc., R. Co. v.....	447
McConnell v. Prest-O-Lite Co.....	697
McGee v. Stockton.....	555
Martin v. Shoub.....	586
Matters, Hopkins v.....	676
Meneely, Frankfort Construc- tion Co. v.....	514
Merchants Nat. Bank v. Nees.....	290
Metal Concrete, etc., Co., Staples-Hildebrand Co. v.....	592
Miller, Garrison v.....	37
— v. Gates.....	485
Miller, Swift & Co. v.....	312
Millgrove School Tp. v. Peck- Hammond Co.....	2
Milner, Toledo, etc., R. Co. v.....	208
Moynihan v. Rockhill.....	685
Mundell, Paxton-Eckman Chemical Co. v.....	45
Murray v. Murray.....	132

N

Nat. Live Stock Ins. Co. v. Simmons.....	15
Nave v. Powell.....	274
Nees, Merchants Nat. Bank v.....	290

New York, etc., R. Co. v. Allen.....	391
Nordyke & Marmon Co. v. Hilborg.....	196

O

Osterhaus v. Creviston.....	382
-----------------------------	-----

P

Patterson v. Town of Ft. Branch.....	333
Paxton-Eckman Chemical Co. v. Mundell.....	45
Peck-Hammond Co., Millgrove School Tp. v.....	2
Pell, City of Indianapolis v.....	191
Pence v. Pence.....	679
Powell, Nave v.....	274
Prest-O-Lite Co., McConnell v.....	697

R

Rainey, Deep Vein Coal Co. v.....	608
Ratcliff, Sims v.....	184
Reed, Warner v.....	544
Robinson v. Horner.....	456
Rockhill, Moynihan v.....	685
Rogers, Harris v.....	696
Rouff, Harris v.....	696

S

Seever, Evans v.....	20
Shantz, Crouch v.....	476
Shoub, Martin v.....	586
Shull v. Dunten.....	602
Simmons, Nat. Live Stock Ins. Co. v.....	15
Sims v. Ratcliff.....	184
Smallwood, Indiana Quarries Co. v.....	33
Smith v. Fiscus.....	156
Spurrier v. Vater.....	669
Staples-Hildebrand Co. v. Metal Concrete, etc., Co.....	592
Stockton, McGee v.....	555
Stodola v. Loewy.....	695
Studebaker Bros. Mfg. Co. v. DeMoss.....	635
Swift & Co. v. Miller.....	312

T

Terre Haute, etc., Traction Co. v. Hunter.....	399
---	-----

CASES REPORTED.

vii

Terre Haute Paper Co. v.		W	
Terre Haute Water Works.	263		
Terre Haute Water Works,			
Terre Haute Paper Co. v.	263	Walker v. Johnson	550
Tieben v. Hapner	650	Warner v. Reed	544
Toledo, etc., R. Co. v. Mil-		Webb, Leach v.	693
ner	203	Williams v. Lowe	357
Topping, Vandalia R. Co.	657	Willis v. Ferguson	563
Town of Ft. Branch, Patterson		Windle v. City of Valparaiso	342
v.	333	Wittekindt, Kaiser v.	171
V		Y	
Vandalia R. Co. v. Topping	657		
Vater, Spurrier v.	669	Young, Brown v.	364

CASES CITED

Abercrombie v. Simmons, 77 Kan. 538.....	665	Babcock v. Wells, 25 R. I. 23. 145	
Abshire v. Williamson, 149 Ind. 248.....	342	Bake v. Smiley, 84 Ind. 212..	566
Acme White Lead, etc., Works v. Indiana Wagon Co., 61 Ind. App. 644.....	449	Baldrige v. Coffey, 184 Ill. 73.....	508
Acton v. Baltimore, etc., R. Co., 59 Ind. App. 280.....	164	Baldwin v. Moroney, 173 Ind. 574.....	556
Adams v. Missouri, etc., R. Co., 100 Mo. 555.....	408, 414	Baltimore, etc., R. Co. v. Hag- an, 183 Ind. 522.....	163
— v. Shewalter, 139 Ind. 178.....	518	— v. Kleespies, 39 Ind. App. 151.....	455
Adams Express Co. v. Cron- inger, 226 U. S. 491.....	213, 215, 217	— v. Miller, 183 Ind. 323..	163
Aebi v. Banks, etc., 124 Wis. 73.....	326	— v. Trustees Tunnelton Lodge, etc., 50 Ind. App. 220.....	296
Aetna Ins. Co. v. Boon, 95 U. S. 117.....	410	Balzer v. Waring, 176 Ind. 585.....	411
Aetna Life Ins. Co. v. Bock- ting, 39 Ind. App. 586.....	543	Bancroft v. Bancroft, 61 Atl. 689.....	673
Alabama, etc., R. Co. v. Cox, 173 Ala. 629.. 408, 413, 415, 416		Bank of Montreal v. Taylor, 86 Ill. App. 388.....	171
Aldred v. Sylvester, 184 Ind. 542.....	433, 434, 499	Bannse v. Northern Pac. R. Co., 205 Fed. 328.....	43
Alerding v. Allison, 170 Ind. 252.....	279	Barber v. Barber, 156 Ind. 45.	549
Allen v. Craft, 109 Ind. 476..	469	Barker v. Chicago, etc., R. Co., 51 Ind. App. 669.....	59
— v. Mansfield, 108 Mo. 343.....	107	— v. Town of Petersburg, 41 Ind. App. 447. 434, 469, 499	
— v. South Boston R. Co., 150 Mass. 200.....	331	Barner v. Bayless, 134 Ind. 600.....	3
Alsman v. Walters, 184 Ind. 565.....	433, 496, 497	Barnes v. Luther, 77 Hun. 234.	511
Alsmeyer v. Adams, 62 Ind. App. 219.....	351, 355, 527	— v. Stock, 51 Ind. App. 640.....	14
American Car, etc., Co. v. Smock, 48 Ind. App. 359..	285	— v. Union School Tp., 91 Ind. 301.....	390
Amos v. Amos, 117 Ind. 19...	433, 497	Barnett v. Lucas, 27 Ind. App. 441.....	97
Anderson v. Evansville, etc., Assn., 49 Ind. App. 403..	455	Bartlett v. Seoor, 56 Wis. 520.	107
— v. State, 179 Ind. 590..	297	Bass Foundry, etc., Works v. Board, 115 Ind. 234.....	244
Anderson Foundry etc., Works v. Meyers, 15 Ind. App. 385.	308	Basye v. Paola Refining Co., 79 Kan. 755.....	374, 377
Angevine v. Ward, 66 Ind. 460.....	694	Baughman v. Lowe, 41 Ind. App. 1.....	358
Apperson v. Lazro, 44 Ind. App. 186.....	181	Beard v. Goulding, 55 Ind. App. 398.....	361
Asbury v. Frisz, 148 Ind. 513.....	233	— v. Hosier, 58 Ind. App. 14.....	31
Aspell v. Smith, 134 Pa. St. 59.....	423	Bell v. Longworth, 6 Ind. 273 ... 105, 107, 108, 109, 112, 115	
Atkinson v. Wabash R. Co., 143 Ind. 501.....	152	— v. Shaffer, 154 App. 413.	657
Avery v. Akins, 74 Ind. 283..	439	Belt Railroad, etc., Co. v. McClain, 58 Ind. App. 171.	417, 455
		Benjamin v. McElwaine-Rich- ards Co., 10 Ind. App. 76	94 121

Bennett v. Nashville Trust Co., 127 Tenn. 126.....	508	Bouchard v. Dirigo, etc., Ins. Co., 113 Me. 17.....	542
— v. Root Furniture Co., 176 Ind. 606.....	531	Bowen v. Wickersham, 124 Ind. 404.....	61, 62
— v. Seibert, 10 Ind. App. 369.....	337	Bowlus v. Phoenix Ins. Co., 133 Ind. 106.....	18
Berkey, Gdn. v. Rensberger, 49 Ind. App. 226.....	460	Bowman v. Clemmer, 50 Ind. 10.....	591
Berkshire v. Caley, 157 Ind. 1. 684		Boyd v. Schott, 152 Ind. 161. 296	
Bernstein v. Meech, 130 N. Y. 354.....	584	Boyer v. Tiedeman, 34 Ind. 72. 283	
Bevington v. Bevington, 133 Iowa 351.....	389	Brady v. Klein, 133 Mich. 422. 621	
Bice v. Nixon, 34 W. Va. 107. 502		Brandt v. Little, 47 Wash. 194.....	487
Bigelow v. Finch, 11 Barb. 498. 146		Branson v. Studabaker, 133 Ind. 147.....	666
Biggs v. McCarty, 86 Ind. 352.....	446	Brashear v. City of Madison, 142 Ind. 685.....	676
Binns v. Dazey, 147 Ind. 536.....	653, 656	Brauns v. Glesige, 130 Ind. 167.....	268
Birmingham, etc., R. Co. v. Seaborn, 168 Ala. 658. 408, 415		Brazil, etc., Co. v. Cain, 98 Ind. 282.....	395
Blank v. Independent Ice Co., 153 Iowa 241.....	285, 286	Brazil, etc., Coal Co. v. Young, 117 Ind. 520.....	617
Blackwell v. Ketcham, 53 Ind. 184.....	319	Bright Nat. Bank v. Hartman, 61 Ind. App. 440.....	323
Bloss v. Myers, 58 Ind. App. 34.....	604	Brillhart v. Mish, 99 Md. 447. 502	
Blythe v. Denver, etc., R. Co., 15 Colo. 333.....	411	Brockman v. City of Creston, 79 Iowa 587.....	675
— v. Gibbons, 141 Ind. 332. 61		Bromberg v. Eugenotto Constr. Co., 158 Ala. 323.....	43
Board, etc. v. Chambers, 75 Ind. 409.....	6	Brown v. Brown, 139 Ind. 653.....	78, 79
— v. Cincinnati, etc., Co., 128 Ind. 240.....	244	— v. —, 28 L. R. A. (N. S.) 125.....	503
— v. Gibson, 158 Ind. 471.....	244, 527	— v. Fletcher, 182 Fed. 963. 285	
— v. Loeb, 68 Ind. 29.....	336	— v. Norvell, 96 Ark. 609.....	105, 114
— v. Newlin, 132 Ind. 27.....	244	Bruce v. Osgood, 113 Ind. 360.....	139, 143
— v. Pashong, 41 Ind. App. 69.....	528	Brulets Creek, etc., Co. v. Pomatto, 172 Ind. 288.....	386
— v. Silvers, 22 Ind. 491.....	244	Bryant v. Logan, 56 W. Va. 141.....	673
— v. Spokane Toilet Supply Co., 50 Wash. 204.....	183	— v. Richardson, 126 Ind. 145.....	487
— v. Tincher, etc., Co., 49 Ind. App. 221.....	478	Bryson v. Crown Oil Co., 185 Ind. —.....	696
— v. Woodcliffe, etc., Co. 74 N. J. Law, 355.....	621	Buck v. Havens, 40 Ind. 221.....	167
Boes v. Grand Rapids, etc., R. Co., 59 Ind. App. 271.....	164	Buffkin v. State, 182 Ind. 204. 297	
Bofl v. Fisher, 3 Rich. Eq. 1.....	440, 509, 511	Bump v. Sellers, 54 Ind. App. 146.....	483
Bohn v. Port Jervis Gas Light Co., 9 L. R. A. 711, note.....	41	Bunch v. Grave, 111 Ind. 351. 285	
Bond v. Mayor, 19 N. J. Eq. 376.....	238	Burns v. Fox, 113 Ind. 205.....	390
Bonnell v. Allen, 53 Ind. 130. 44		Burr v. Smith, 152 Ind. 469.....	118
Bonner v. Bonner, 28 Ind. App. 147.....	476	Burrall v. Bander, 61 Mich. 608.....	644
Boston, etc., R. Co. v. Hooker, 233 U. S. 97.....	213, 217	Burroughs v. Burroughs, 180 Ind. 380.....	684
Bottema v. Tracy, 58 Ind. App. 96.....	174	Butler v. Moore, 94 Ind. 359.....	471
		Butler University v. Conard, 94 Ind. 353.....	549

Buzzell v. Gallagher, 28 Wis. 678.....	143	Cincinnati, etc., R. Co. v. Harris, 61 Ind. 291	283
Cahn v. Metz, 115 App. Div. 516.....	238	Citizens Street R. Co. v. Heath, 29 Ind. App. 395....	298
Campbell v. Horner, 12 Ind. App. 86.....	566	— v. Twiname, 111 Ind. 587.....	420
— v. Indianapolis, etc., R. Co., 110 Ind. 490.....	664	City v. Galpin, 183 Ill. 399...	246
Carlson v. Stocking, 91 Wis. 432.....	562	— v. Lawton, 18 Cal. 465....	146
Carroll v. Sweet, 123 N. Y. 19.	326, 329	— v. Spaulding, 50 Am. Dec. 775.....	621
Carson v. Blodgett, 189 Mo. App. 120.....	619	— v. Shepler, 190 Pa. 374....	246
Carter v. Harvey, 77 Miss. 1. 646 — v. White, 101 Am. St. 869, 870.....	444, 510	City of Burlington v. Stock- well, 5 Kan. App. 569.....	673
Case Threshing Machine Co. v. Feezer, 152 N. C. 516....	591	City of Decatur v. Eady, — Ind. App. —.....	386
Cate v. Cranor, 30 Ind. 292....	469	City of Ft. Wayne v. Lehr, 88 Ind. 62.....	128
Cavanaugh v. Smith, 84 Ind. 380.....	488	City of Gary v. Much, 180 Ind. 26.....	353
Central Union Tel. Co. v. Fehring, 146 Ind. 189.....	270	City of Indianapolis v. Maag, 57 Ind. App. 493.....	353, 528
— v. State, ex rel., 118 Ind. 194.....	270	— v. Williams, 58 Ind. App. 447.....	525
C. F. Adams Co. v. Helman, 58 Ind. App. 394.....	144	City of Logansport v. Webster, 45 Ind. App. 499.....	526
Chamberlain v. Runkle, 28 Ind. App. 599.....	472	City of Maryville, ex rel. Bank v. Lippman, 151 Mo. App. 447.....	242, 254
Chase v. Van Meter, 140 Ind. 321.....	145	City of New York v. Hamilton Fire Ins. Co., 23 N. Y. Sup. Ct. 537.....	542
Cheesman v. Thorne, 1 Edw. Chan. 629....	444, 447, 509, 511	City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1.....	107
Chicago, etc., R. Co. v. Core, 176 S. W. 778.....	217	City of Richmond, v. Dick- son, 155 Ind. 345.....	128
— v. Dinius, 180 Ind. 596..	212, 277, 451, 458	City of Rushville v. Rushville, etc., Gas Co., 132 Ind. 575.	270
— v. Hamerick, 50 Ind. App. 425.....	534	Clafin v. Bank, 25 N. Y. 293.	331
— v. Huncheon, 130 Ind. 529.....	665	Clark v. Gilbert, 39 Conn. 94.	124
— v. Johnson, 45 Ind. App. 162.....	526	Clark v. Jeffersonville, etc., R. Co., 44 Ind. 248.....	152
— v. Mitchell, 184 Ind. 588.	202	Cleland v. Applegate, 8 Ind. App. 499.....	97
— v. —, 56 Ind. App. 354.	416	Clem v. Newcastle, etc., R. Co., 9 Ind. 488.....	50
— v. Schenkel, 57 Ind. App. 175.....	361	Clendenin v. Pickett, 51 Ind. App. 283.....	41
— v. State, ex rel., 159 Ind. 237.....	3	Cline v. Beaver, 183 Ind. 296.	341
Chipman v. Wells, 34 Ind. App. 1.....	566	Cleveland v. Spilman, 25 Ind. 95.....	466
Church v. People, 174 Ill. 366.	238	Cleveland, etc., R. Co. v. Clark, 51 Ind. App. 392....	416, 453
Cincinnati, etc., R. Co. v. Ac- rea, 42 Ind. App. 127.....	411	— v. Hadley, 170 Ind. 204.	195
— v. Cregor, 150 Ind. 625....	119	— v. Hayes, 181 Ind. 87....	213, 217, 219
— v. Geisel, 119 Ind. 77.....	664, 665	— v. Hollowell, 172 Ind. 466.....	217, 218
		— v. Powers, 173 Ind. 105.	410
		Clevenger v. Clevenger, 59 Ind. App. 13.....	556

Clough v. London and North-western Railway, L. R., 7 Ex. 26.....	376	Criswell v. Board, 34 Wash. 420	245, 255
Cluggish v. Koons, 15 Ind. App. 599.....	170	Cross v. Herr, 96 Ind. 96.....	119
Clyburn v. Reynolds, 31 S. C. 91.....	508	Crowder v. Doe, 162 Ala. 151. 108	
Cobb v. Taylor, 133 Ind. 605. 63		Culbertson v. Munson, 104 Ind. 451.....	44
Coffman v. Coffman, 41 W. Va. 8.....	78	Culver v. Marks, 122 Ind. 554.....	97, 360
Cohoon v. Fisher, 146 Ind. 583.....	286	— v. Waters, 248 Ill. 163....	97
Coleman v. State, 111 Ind. 563.....	299	Cumberland Tel., etc., Co. v. Kranz, 48 Ind. App. 67....	412
Colgan v. Forest Oil Co., 194 Pa. St. 234.....	600	Cummings v. Daniel, 39 Ky. (9 Dana) 361.....	644
Collett v. Board, etc., 119 Ind. 27.....	115	Cunningham v. McCollum, 98 Ind. 38.....	62, 63
Collins v. Delaporte, 115 Mass. 159.....	578	Curran v. A. H. Stange Co., 98 Wis. 598.....	204
— v. Dressler, 133 Ind. 290. 60		Curtiss v. Brown, 29 Ill. 201. 506	
Combs v. Union Trust Co., 146 Ind. 688.....	423	Curvin v. Grimes, 116 S. W. 725.....	617
Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210. 326		Cutsinger v. Ballard, 115 Ind. 93.....	115, 389
Conant v. National State Bank, 121 Ind. 323.....	304, 306, 310	Dale v. Travelers Ins. Co., 89 Ind. 473.....	61
Condon v. New Rochelle Water Co., 116 N. Y. Supp. 142. 271		Danes v. Pearson, 6 Ind. App. 465.....	300
Conlan v. Roemer, 52 N. J. Law 53.....	54	Daniels v. Hudson River Fire Ins. Co., 12 Cush. (Mass.) 416.....	542
Conlee v. Clark, 14 Ind. App. 205.....	381	— v. Newton, 114 Mass. 530.....	578
Conner v. Citizens Street R. Co. 146 Ind. 430.....	395	Darnell v. Keller, 18 Ind. App. 103.....	232, 233, 237, 239
— v. Conner, 29 Ind. 48....	398	Darter v. Grubb, 56 Ind. App. 206.....	375
Consolidated Stone Co. v. Summit, 152 Ind. 297....	180	Datesman's Appeal, 127 Pa. 348.....	512
Continental Ins. Co. v. Chew, 11 Ind. App. 330.....	18	Davenport v. Buffington, 97 Fed. 234.....	674
Coquillard v. Coquillard, 62 Ind. App. 489.....	429, 447	Davis v. Broyles, 55 Ind. App. 316.....	685
— v. — 62 Ind. App. 426		— v. Coblens, 174 U. S. 719. 297	
— 492, 510		Davis v. Davis, 68 Miss. 478. 105	
Corporation, etc. v. Paterson, etc., Co., 106 Ga. 538....	541	— v. —, 141 Ind. 367....	399
Cotterell v. Koon, 151 Ind. 182.....	233	— v. Mercer Lumber Co., 164 Ind. 413.....	195
Coulter v. Clark, 160 Ind. 311. 54		— v. Pioneer Furniture Co., 102 Wis. 394.....	542
Coverdale v. Edwards, 155 Ind. 374.....	353	Dawson v. Hipskind, 173 Ind. 216.....	237
Cox v. Albert, 78 Ind. 241....	485	Day v. Connecticut, etc., Ins. Co., 45 Conn. 480. 578, 579, 583	
Coy v. Indianapolis Gas Co., 146 Ind. 655.....	270	Decker v. Yoke, 179 Ind. 243. 44	
Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40....	42, 233	Deeter v. Sellers, 102 Ind. 458. 485	
Creighton v. Hoppis, 99 Ind. 369.....	121	DeHoust v. Lewis, 128 App. Div. 131.....	326
Crichfield v. Bermudez, etc., Co., 174 Ill. 466.....	349	Deinhart v. Mugg, 176 Ind. 531.....	341
		Deller v. Hofferberth, 127 Ind. 414.....	621

- Denney v. State, ex rel., 144 Ind. 503.....170
 Dingley v. Oler, 117 U. S. 490. 578
 Ditton v. Hart, 175 Ind. 181. 635
 Dobbins v. McNamara, 113 Ind. 54.....488
 Dodge Mfg. Co. v. Krone-witter, 57 Ind. App. 190. 456
 Doe v. Considine, 6 Wall. 458. 433
 Dolon v. Davidson, 16 Misc. Rep. 316.....326
 Domestic Coal Co. v. De Army, 179 Ind. 592.....35, 375, 625
 Downey v. Seib, 8 L. R. A. (N. S.) 49.....440, 444, 509
 Driftwood Co. v. Bartholomew Co., 72 Ind. 226.....128
 Drollinger v. Drollinger, 57 Ind. App. 115.....397
 Drum v. Stevens, 94 Ind. 181. 390
 Dubach v. Hannibal, etc., Co., 89 Mo. 483.....352
 DuBois v. Home, etc., Assn., 183 Ind. 343.....174
 Dugger v. Hicks, 11 Ind. App. 374.....245
 Dunbar v. United States, 156 U. S. 185.....423
 Dunham v. Doremus, 55 N. J. Eq. 511.....441, 509
 Dunn v. State, 163 Ind. 317.. 42
 Durham v. Shannon, 116 Ind. 403.....119
 Dwyer v. Mayor, 77 App. Div. 224.....245
 Dyer v. Eldridge, 136 Ind. 654.....115, 117, 118
 Earle v. Earle, 91 Ind. 27....488
 Eberle v. Gaier, 89 Ohio 118.. 502
 Eckart v. Marion, etc., Co., 59 Ind. App. 217.....605
 Edens v. Miller, 147 Ind. 208. 60
 Edward Thompson Co. v. Schroeder, 154 N. W. 792.. 52
 Edwards v. Cooper, 168 Ind. 54.....244
 Egbert v. Lake Shore, etc., R. Co., 6 Ind. App. 350.....526
 Eiermann v. Milwaukee, 142 Wis. 606.....234, 254
 Eissler v. Hoppel, 158 Ind. 82.....78, 79
 Ellerbe v. State, 75 Miss. 522. 299
 Elliott v. Leslie, 124 Ky. 553. 77
 Elsea v. Adkins, 164 Ind. 580. 60
 Embler v. Gloucester Lumber Co., 167 N. C. 457.....619
 Emerson v. Fay, 94 Va. 60. 562
 Evans v. Inhabitants of Trent-on, 24 N. J. L. 764.....129
 Evansville, etc., R. Co. v. Kyte, 6 Ind. App. 52.....408
 Evansville Hoop, etc., Co. v. Bailey, 43 Ind. App. 153.. 411
 Ewing v. Burnet, 11 Peters, 41. 116
 — v. Ewing, 161 Ind. 484... 31
 Ex Parte Kilgore, 120 Ind. 94. 647
 Fain v. Garthwright, 5 Georgia R.....111
 Faust v. American Fire Ins. Co., 91 Wis. 158.....542
 Federal Life Ins. Co. v. Kerr, 173 Ind. 613.....71
 Fell v. Rich Hill, etc., Co., 23 Mo. App. 216.....617
 Fenstermaker v. Holman, 158 Ind. 71.....466
 Field v. Barling, 149 Ill. 556. 351
 Field v. Brown, 146 Ind. 293. 284
 Finley v. Cathcart, 149 Ind. 470.....93
 First Nat. Bank v. Currie, 147 Mich. 72.....326, 329
 — v. Miller, 37 Neb. 500... 326
 First Universalist Society v. Boland, 15 L. R. A. 231....434, 499
 Fitzmaurice v. Puterbaugh, 17 Ind. App. 318.....309
 Fivecoat v. Fivecoat, 32 Iowa 198.....398
 Flagg v. Mann, 14 Pick. 467.. 146
 Flanigan v. Waters, 57 Kan. 18. 389
 Fleming v. Yost, 137 Ind. 95. 97
 Foer v. Edwards, 45 Ind. App. 259.....41
 Forsythe v. City of Hammond, 142 Ind. 505.....335
 Fort v. White, 58 Ind. App. 524.....554
 Fort Wayne, etc., R. Co. v. Sherry, 126 Ind. 334....664
 Foshier v. Williams, 120 Ind. 172.....643
 Foss v. Newberry, 20 Ore. 257. 52
 Foster v. Fidelity, etc., Co., 99 Wis. 447.....425
 Ft. Worth, etc., R. Co. v. Cauble, 41 Tex. Civ. App. 348.....425
 Fowler v. Newsom, 174 Ind. 104.....94
 Fox v. Fee, 24 App. Div. 314.....444, 510
 Fox v. Town of Monticello, 83 Ind. 483.....607
 Francis v. Kansas City, etc., R. Co., 127 Mo. 658.....204

Frankel v. Garrard, 160 Ind. 209.....	233	Grant v. Lexington, etc., Ins. Co., 5 Ind. 23.....	542
French v. Frazier, 30 Ky. *425.....	7	Gratz v. City of Kirkwood and Robert Wycoff, 165 Mo. App. 196.....	244
Frenzel v. Miller, 37 Ind. 1.....	304, 306, 308	Green v. Eden, 24 Ind. App. 583.....	181
Frost v. Knight, L. R. (7 Exch.), 111.....	585	— v. Kellum, 23 Pa. St. 254	105, 108
Fry v. Hare, 166 Ind. 415.....	502	Greenfield Gas Co. v. Trees, 165 Ind. 209.....	270
— v. Seely, 55 Ind. App. 670.352		Greenfield Lumber, etc., Co. v. Parker, 159 Ind. 571.....	596
Fudge v. Marquell, 164 Ind. 447.....	284	Griffin v. Jackson, etc., Co., 92 Am. St. 496.....	621
Fullenwider v. Watson, 113 Ind. 18.....	187, 190	Grusenmeyer v. City of Logan- sport, 76 Ind. 549.....	335
Furnas v. Friday, 102 Ind. 129 308		Haas v. C. B. Cones, etc., Co., 25 Ind. App. 469.....	93
Gage v. People, 56 L. R. A. 923.....	239, 240, 253	Haddon v. Crawford, 49 Ind. App. 551.....	653
Galbraith v. McLain, 84 Ill. 379.....	78	Haffner v. Barnard, 123 Ind. 429.....	485
Gardner v. Mann, 36 Ind. App. 694.....	373	Haggart v. Stehlin, 137 Ind. 43.....	41
Garside v. Wolf, 135 Ind. 42.....	341	Hale v. Hale, 146 Ill. 227. 444, 506	
Gartner v. Corwine, 57 Ohio St. 246.....	283, 286	Ham v. Delaware, etc., R. Co., 155 Pa. St. 548.....	408
Gary, etc., R. Co. v. Hacker, 58 Ind. App. 618.....	2	Hamilton v. Sidwell, (131 Ky. 428) 29 L. R. A. 961, notes.	468, 472, 476
Gas Light, etc., Co. v. City of New Albany, 158 Ind. 268. 572		Hamilton Nat. Bank v. Nye, 37 Ind. App. 464.....	319, 320
Gatling v. Newell, 9 Ind. 572. 304		Hammond v. Story, 85 Ind. 457.....	63
Gavin v. Curtin, 171 Ill. 640.	444, 447, 508, 511	Hannigan v. Wright, 5 Pen. (Del.) 537.....	181
Gay v. Parpart, 106 U. S. 679. 143		Hannon v. Hilliard, 101 Ind. 310.....	60
Georgia, etc., R. Co. v. McAl- lister, 126 Ga. 447.....	408	Harness v. Harness, 50 Ind. App. 364.....	654
Gerhard v. Ford Motor Co., 155 Mich. 618.....	183	Harrah v. Dyer, 180 Ind. 229. 212	
German-American Ins. Co. v. Yeagley, 163 Ind. 651.....	540	Harris v. Frank, 81 Cal. 280..	5
German Fire Ins. Co. v. Green- wald, 51 Ind. App. 469.....	539	— v. International, etc., Constr. Co., 62 Ind. App. 64.....	696, 697
German National Bank v. Studley, 1 Mo. App. 260.....	320	Harrison v. School Dist., etc., 89 Mo. 184.....	108
Germania Life Ins. Co. v. Lunkenheimer, 127 Ind. 536. 18		Harrison & Bro. v. Homeo- pathic Assn., 134 Pa. St. 558. 381	
Gifford v. Gifford, 58 Ind. App. 665.....	121	Hart v. Haynes, 150 Pac. (Kan.) 530.....	52
Gipe v. Pittsburgh, etc., R. Co., 41 Ind. App. 156.....	50	— v. Pennsylvania, etc., R. Co., 112 U. S. 331.....	213
Glens Falls Ins. Co. v. Michael, 167 Ind. 659.....	540, 543	Hartford Life Ins. Co. v. Hope, 40 Ind. App. 354.....	304
Goodwin v. Bentley, 30 Ind. App. 477.....	120	Harting v. Vandalia Coal Co., 50 Ind. App. 98.....	631
Goodwine v. Cadwallader, 158 Ind. 202.....	66, 73	Hartzell v. Pranger, — Ind. App. —.....	382
Gordon v. Levine, 194 Mass. 418.....	326, 328	Harvey v. Ball, 32 Ind. 98.....	653
Gorman v. Gorman, 54 Ind. App. 408.....	233		
— v. Johnson, 46 Ind. App. 672.....	232, 233, 234, 250, 251		
Gough v. Staats, 13 Wend. 549. 329			

Hastings v. Columbus, 42 Ohio St. 585.....	244	Horne v. Rogers, 110 Ga. 362.....	299
Hatfield v. Cummings, 152 Ind. 537.....	279	Horner v. Clark, 27 Ind. App. 6.....	390
— v. Rooker, 56 Ind. App. 1.....	481, 631	— v. McConnell, 158 Ind. 280.....	389, 390
Hawkins v. McDougal, 125 Ind. 597.....	435, 502	Hornet v. Dumbeck, 39 Ind. App. 482.....	60, 63
Hayes v. Shirk, 167 Ind. 569.....	5	House v. Fort, 4 Blackf. 293.....	591
Hays v. Hays, 49 Ind. App. 298.....	153	Houtz v. Union Pac. R. Co., 33 Utah 175.....	217
Headrick v. McDowell, 102 Va. 124.....	77	Howe Mach. Co. v. Brown, 78 Ind. 209.....	51
Hedin v. Minneapolis Medical, etc., Institute, 62 Minn. 146.....	304	Howland v. Continental Life Ins. Co., 121 Mass. 499.....	583
Heilman v. Heilman, 129 Ind. 59.....	466	Hudelson v. Hudelson, 164 Ind. 694.....	460
Hellenkamp v. City, 30 Ind. 192.....	245	Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall. 276.....	301
Helms v. Cook, 58 Ind. App. 259.....	386, 635	Huffman v. Copeland, 139 Ind. 221.....	640, 644
Hennessey v. Taylor, 189 Mass. 583.....	181, 183	Huffstetter v. Buzett, 32 Ind. 293.....	54
Henning v. State, 106 Ind. 386.....	299	Hughes v. Funston, 23 Iowa 257.....	592
Henry v. Brown, 143 Ala. 446.....	108	— v. Israel, 73 Mo. 538.....	105, 108
Henshaw v. Root, 60 Ind. 220.....	360	Hull v. Louth, 109 Ind. 315.....	3
Hett v. Portsmouth, 73 N. H. 334.....	246	Humphrey v. Thorn, 63 Ind. 296.....	503
Hexamer v. Webb, 101 N. Y. 377.....	562	Hunter v. McLaughlin, 43 Ind. 38.....	304, 306
Higham v. Vanosdol, 125 Ind. 74.....	78	Hurlbert v. T. D. Kellog Lumber, etc., Co., 115 Wis. 225.....	52
Hill v. Chicago, etc., R. Co., 61 Ind. App. 331.....	606	Hutchinson v. Lemeke, 107 Ind. 121.....	549
Hillyard v. Robinson, 53 Ind. App. 107.....	122	I. F. Force Handle Co. v. His-ey, 52 Ind. App. 235.....	35
Hines v. Driver, 72 Ind. 125.....	51	Illinois, etc., R. Co. v. Henderson Elevator Co., 226 U. S. 441.....	213
Hirth v. City of Indianapolis, 18 Ind. App. 673.....	525	Indiana, etc., Gas Co. v. Anthony, 26 Ind. App. 307.....	270
Hitchcock v. Galveston, 96 U. S. 341.....	246	— v. State, 158 Ind. 516.....	270
Hochster v. DeLatour, 2 El. & Bl. 678.....	578	Indiana Ins. Co. v. Hartwell, 123 Ind. 177.....	538, 539
Hoffa v. Hoffman, 33 Ind. 172.....	310	Indiana Iron Co. v. Cray, 19 Ind. App. 565.....	561
Hoffman v. Hollingsworth, 10 Ind. App. 353.....	360	Indiana Life, etc., Co. v. Reed, 54 Ind. App. 450.....	578
Holcroft, et al. v. Hunter, 3 Blackf. 147.....	111, 118	Indiana Mfg. Co. v. Wells, 31 Ind. App. 460.....	35
Holloran v. Morman, 27 Ind. App. 309.....	237, 239, 245	Indiana R. Co. v. Calvert, 168 Ind. 321.....	349, 350
Home Ins. Co. v. Sylvester, 25 Ind. App. 207.....	18	Indiana Traction Co. v. Pring, 50 Ind. App. 566.....	279
Hoosier Stone Co. v. Louisville, etc., R. Co., 131 Ind. 575.....	93	Indiana Union Traction Co. v. Keiter, 175 Ind. 268.....	408, 534
Hoover v. Lewin, 56 Ind. App. 367.....	485		
Hopkins v. Tanqueray, 15 C. B. 130.....	590		

CASES CITED.

xv

Indiana Union Traction Co. v. Love, 180 Ind. 442.....	195	Julius Keller Constr. Co. v. Herkless, 59 Ind. App. 472.....	619
Indianapolis, etc., R. Co. v. Center Tp., 143 Ind. 63.....	668	Kahle v. Crown Oil Co., 180 Ind. 131.....	375
— v. Foreman, 162 Ind. 85.....	204	Kann v. Brooks, 54 Ind. App. 625.....	61
— v. Lewis, 119 Ind. 218.....	180, 664	Kaufman v. Alexander, 180 Ind. 670.....	212
— v. State, ex rel., 37 Ind. 489.....	526	— v. Stein, 138 Ind. 49.....	41
— v. Waddington, 169 Ind. 448.....	455	Keeler v. Lederer, etc., Cor., 26 R. I. 524.....	621
Indianapolis, etc., Switch Co. v. Boyle, 18 Ind. App. 169.....	204	Keithley v. Lusk, 190 Mo. App. 458.....	217
Indianapolis, etc., Transit Co. v. Edwards, 36 Ind. App. 202.....	420	Kellner v. Phillips, 29 Ind. App. 100.....	425
— v. Reeder, 51 Ind. App. 533.....	297	Kemery v. Zeigler, 176 Ind. 660.....	51
Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360.....	410	— v. —, 184 Ind. 144.....	449
Inland Steel Co. v. Kiessling, 183 Ind. 117.....	550	Kent v. Church of St. Michael, 136 N. Y. 10.....	441, 509
— v. Smith, 168 Ind. 245.....	458	Kentucky, etc., R. Co. v. Bidle, 17 Ky. L. R. 1363.....	408
In re Simon, 158 Mich. 256.....	78	— v. Buckler, 125 Ky. 24.....	408
Interstate Coal Co. v. Baxavemie, 144 Ky. 172.....	617	Kershaw v. Kershaw, 102 Ind. 307.....	78
Irey v. Markly, 132 Ind. 546.....	106	Key v. Ostrander, 29 Ind. 1.....	60
Jackson v. Creek, 47 Ind. App. 541.....	118	Kimball v. Bangs, 144 Mass. 321.....	306
Jaffray v. Krauss, 79 Hun. 449.....	319	King v. Ackerman, 2 Black (67 U. S.) 408.....	466
Jeffersonville Water Supply Co. v. Riter, 138 Ind. 170.....	381	— v. Carmichael, 136 Ind. 20.....	106
Jenkins v. Steele, 55 Ind. App. 11.....	92	— v. Rea, 56 Ind. 1.....	472
Jenney Electric Mfg. Co. v. Flannery, 53 Ind. App. 397.....	207	Kingan & Co. v. Clements, 184 Ind. 213.....	201
J. I. Case Threshing Machine Co. v. Webb, 181 S. W. 853.....	52	Kingman v. Sparrow, 12 Barb. 201.....	146
Jochem v. Dutcher, 104 Wis. 611.....	644	Kinney v. Heuring, 42 Ind. App. 263.....	478
John v. Bradbury, 97 Ind. 263.....	187	— v. Kiernan, 49 N. Y. 164.....	285
Johnson v. Bebout, 59 Ind. App. 159.....	2	Kinsey v. Union Traction Co., 169 Ind. 563.....	525
— v. Johnson, 57 Kan. 343.....	399	Kirby v. Kirby, 142 Ind. 419.....	233
— v. Sherwood, 34 Ind. App. 490.....	284	Knickerbocker Ice Co. v. Surprise, 53 Ind. App. 286.....	44
— v. Zimmerman, 42 Ind. App. 165.....	96	Knight & Jilson Co. v. Castle, 172 Ind. 97.....	595
Johnson Harvester Co. v. Bartly, 94 Ind. 131.....	108	Knotts v. Stearns, 91 U. S. 638.....	445
Johnstone v. Milling, L. R. (16 Q. B. D.) 460.....	585	Knowlton v. School City, etc., 75 Ind. 103.....	320
Jones v. Levi, 72 Ind. 586.....	108	Kopelke v. Kopelke, 112 Ind. 435.....	7
— v. Quick, 28 Ind. 125.....	590	Kruse v. St. Louis, etc., R. Co. 97 Ark. 137.....	299
Jordan v. Indianapolis Water Co., 159 Ind. 337.....	301	Lacey v. Lacey, 108 Cal. 45.....	399
Judy v. Woods, 51 Ind. App. 325.....	174	Laffery v. Unites States, etc., Co., 83 Kan. 349.....	619

- LaFollette Coal, etc., Co. v. Whiting Foundry, etc., Co., 25 Ind. App. 647.....326
 Lake v. Jones, 49 Ind. 297...167
 Lake Erie, etc., R. Co. v. Charman, 161 Ind. 95.....409, 411
 — v. Michener, 117 Ind. 465.....664
 — v. Parrish, 46 Ind. App. 577.....182
 — v. Reed, 57 Ind. App. 65.....418
 — v. Walters, 13 Ind. App. 275.....245
 Lake Shore, etc., R. Co. v. Stupak, 108 Ind. 1.....204
 — v. —, 123 Ind. 210...204
 Lancaster Silver Plate Co. v. National, etc., Ins. Co., 170 Pa. 151.....540, 542
 Landes v. Walls, 160 Ind. 216...673
 Lane v. Utz, 130 Ind. 235....472
 Langohr v. Smith, 81 Ind. 495. 62
 Lauson v. Town of Fond du Lac, 141 Wis. 57.....181
 Lauster v. Meyers, 170 Ind. 548.....341, 480
 Leach v. Adams, 21 Ind. App. 547.....285
 — v. Dickerson, 14 Ind. App. 375.....94
 — v. State, 177 Ind. 234...458
 Lebanon Min. Co. v. Roger, 8 Colo. 34.....114
 Ledford v. Ledford, 95 Ind. 283.....298
 Leeds v. Boyer, 59 Ind. 289... 51
 Lewis v. Owen, 64 Ind. 446, 61, 63
 — v. Town of North Kingstons, 16 R. I. 15.....268
 L'Hommedien v. Cincinnati, etc., R. Co., 120 Ind. 435...115
 Lilly v. City of Indianapolis, 149 Ind. 648.....353
 Lindley v. Sullivan, 133 Ind. 588.....396
 Little v. Phenix Bank, 2 Hill 425.....326
 Liverpool, etc., Ins. Co. v. Agricultural, etc., Loan Co., 33 Can. S. C. 94.....541
 Long Branch Commission v. Tintern Manor Water Co., 70 N. J. Eq. 71.....271
 Loomis v. Stevens, 18 Ind. App. 184.....425
 — v. Wadhams, 8 Gray 557...423
 Loughborough v. Loughborough, 53 Ky. 549.....644
 Louisville, etc., Co. v. Hughes, 134 Ga. 75.....619
 — v. Nolan, 135 Ind. 60...408, 455
 Louisville, etc., R. Co. v.... Thompson, 107 Ind. 442...119
 Louisville, etc., Traction Co. v. Worrall, 44 Ind. App. 480...195
 Lowe v. Thompson, 86 Ind. 503.....152
 Lux, etc., Stone Co. v. Donaldson, 162 Ind. 481.....250, 251
 Lyons v. City of New Albany, 54 Ind. App. 416.....195
 Lytle v. Beveridge, 58 N. Y. 592.....146
 M'Call v. Neely, 3 Watts 69.....105, 108, 113
 McAllister v. New England, etc., Ins. Co., 101 Mass. 558...583
 McBeth v. Wetnight, 57 Ind. App. 47.....104, 106, 107, 115
 McCain v. City, 128 Iowa 331...253, 254
 McClellan v. Kellogg, 17 Ill. 498.....105, 108
 McClure v. Mutual, etc., Ins. Co. 242 Pa. 59.....542
 McCord v. Bright, 44 Ind. App. 275.....159
 McCormick, etc., Co. v. Yocman, 26 Ind. App. 415.....307
 McCowan v. Whitesides, 31 Ind. 235.....673
 McCue v. McCue, 149 Ind. 466.....399
 McCullough v. Robinson, 2 Ind. 630.....399
 McFarlan Carriage Co. v. Potter, 153 Ind. 107.....204
 McFarland v. Stansifer, 36 Ind. App. 486.....61
 McGhee v. Stephens, 83 Ala. 466.....644
 McIlhinny v. McIlhinny, 137 Ind. 411.....433, 497
 McIntyre v. Orner, 166 Ind. 57.....195
 McKeesport Machine Co. v. Ben Franklin Ins. Co. 173 Pa. 53.....542
 McKinley v. Britton, 55 Ind. App. 21.....174
 McMillan v. Wylie, 45 Fla. 487.....43
 McNutt v. Hilkins, 29 N. Y. Supp. 1047.....285
 McWhorter v. Heltzell, 124 Ind. 129.....668
 Macbeth Evans Glass Co. v. Jones, 176 Ind. 221.....531
 MacClamrock v. Flint, 101 Ind. 278.....309

Macknet's Exrs. v. Macknet, 24 N. J. Eq. 277.....	649	Meyers v. Winona, etc., R. Co. 58 Ind. App. 516.....	361, 451
Macy v. Wood, 49 Ind. App. 469.....	63	— v. Wood, 173 Mo. App. 564.....	241, 254
Mahan v. Reeve, 6 Blackf. 215.....	63	Michael v. State, 178 Ind.	676, 297
Maitland v. Gilbert Paper Co., 97 Wis. 476.....	204	Michigan Mut. Life Ins. Co. v. Leon, 138 Ind. 636.....	18
Mak-Saw-Ba Club v. Coffin, 169 Ind. 204.....	695	Michigan Trust Co. v. Probasc- co, 29 Ind. App. 109.....	119
Malone v. Stickney, 88 Ind. 594.....	94	Milhau v. Sharp, 17 Barb.	435, 350
Manhattan Oil Co. v. Carrell, 164 Ind. 526.....	600	Miller v. Carmichael, 98 Ind. 236.....	566
Manson v. South Bound R. Co., 64 S. C. 120.....	673	— v. Miller, 91 N. Y. 315....	656
Maple v. Beach, 43 Ind. 51....	93	— v. Nichols, etc., Co., 5 Neb. 478.....	289
Maquire v. Bissell, 119 Ind. 345.....	63	Milligan v. Poole, 35 Ind.	64, 437
Marietta, etc., Co. v. Pruitt, 180 Ind. 434.....	418	Milwaukee, etc., R. Co. v. Kel- logg, 94 U. S. 469.....	410, 412
Marks v. Box, 54 Ind. App. 487.....	97	Missouri, etc., R. Co. v. Harri- man, 227 U. S. 657.....	213
Marsh v. Elliott, 51 Ind. 547.	549	Mitchell v. Brawley, 140 Ind. 216.....	63
— v. Prosser, 64 Ind. 293...	549	— v. Wiles, 59 Ind. 364.....	128
Marsh Bros. Co. v. Bellefleur, 108 Me. 354.....	285	Mitchells v. Johnsons, 33 Va. (6 Leigh) 461.....	649
Martindale v. Alexander, 26 Ind. 104.....	437	Mitten v. Caswell-Runyan Co., 52 Ind. App. 521.....	91, 92
Masters v. Abbitt, 51 Ind. App. 429.....	553	Mohawk Bank v. Broderick, 10 Wend. 304.....	329
May v. Dobbins, 166 Ind. 331.....	118	— v. —, 13 Wend. 133....	330
Mayall v. Mayall, 63 Minn. 511.....	508	Molony v. Dows, 15 How. Pr. 261.....	153
Mead v. Mitchell, 17 N. Y. 210 443, 447, 509, 511	511	Monarque v. Monarque, 80 N. Y. 320.....	511
Meikel v. Borders, 129 Ind. 529.....	63	Monell v. Colden, 13 Johns 395.....	52
Mendenhall v. First New Church, etc., 177 Ind. 336	434, 499	Moore v. Hinkle, 151 Ind.	343, 115
— v. Stewart, 18 Ind. App.	160	— v. Zumbun, 162 Ind.	684
Meroer v. State, 179 Ind.	426	Mordhurst v. Fort Wayne, etc., Traction Co., 163 Ind.	268.....
Meredeth v. People, 84 Ill. 479.....	299	Morris v. City of Indianapolis, 177 Ind. 369.....	524
Mesker v. Bishop, 56 Ind. App. 455.....	548	Morrison v. Universal Marine Ins. Co., L. R., 8 Ex. 197....	376
Metropolitan Life Ins. Co. v. Johnson, 49 Ind. App. 233.	543	Mulvane v. Rude, 146 Ind.	476
— v. McCormick, 19 Ind.	579	—, 187, 190, 466	466
Meyer v. Pittsburg, etc., R. Co., 63 Ind. App. —.....	666	Muncie Elec. Light Co. v. Joliff, 59 Ind. App. 349....	666
— v. Town of Boonville, 162 Ind. 165.....	674	Murray v. Jennings, 42 Conn. 9.....	373
— v. Wilson, 166 Ind. 651	487, 488	— v. Judah, 6 Cowan 484	326
		— v. Tolman, 162 Ill. 417...	309
		Mutual Reserve, etc., Assn. v. Taylor, 99 Va. 208.....	578
		Myer v. Brown, 130 Mich. 449.....	97
		Myers v. Carney, 171 Ind. 379.....	469
		— v. Walker Bros. Co., 104 Ga. 316.....	320, 321

Naltiner v. Dolan, 108 Ind. 500.....	363	Oil Well Supply Co. v. Priddy, 41 Ind. App. 200.....	309
Napier v. Little, 137 Ga. 242. 106		— v. Watson, 168 Ind. 603. 309	
Nashville, etc., R. Co. v. John- son, 60 Ind. App. 416.....	297	Oliver v. Pullman, 24 Fed. 127. 108	
National Live Stock Ins. Co. v. Bartlow, 60 Ind. App. 233.....	18	Olmstead v. Tracy, 145 Mich. 299.....	146
— v. Wolfe, 59 Ind. App. 418.....	161	Olson v. Chicago, etc., R. Co., 94 Minn. 241.....	408
Nave v. Flack, 90 Ind. 205.....	395	Oltman Bros. v. Poland, 142 S. W. 653.....	289
— v. Powell, 52 Ind. App. 496.....	280	O'Neill v. Supreme Council, etc., 70 N. J. Law 410. 577, 578	
N. C. Antle & Bro. v. Sexton, 137 Ill. 410.....	52	Orten v. Tilden, 110 Ind. 131. 635	
Needles v. Needles, 7 Ohio St. 432.....	77	Osborne v. Eslinger, 155 Ind. 351.....	657
Neidefer v. Chastain, 71 Ind. 363.....	306, 311	Outcalt Advertising Co. v. Young Hardware Co., 161 S. W. (Ark.) 142.....	52
Nelson v. American Cement, etc., Co. 84 Kan. 797.....	619	Owen v. Phillips, 73 Ind. 284. 41	
Neu v. Town of Bourbon, 157 Ind. 476.....	684	Owens v. Lewis, 46 Ind. 488.. 44	
New Albany Forge, etc., Co. v. Cooper, 131 Ind. 363.....	561	Palmer v. Beall, 60 Ind. App. 208. 175, 277, 386, 449, 459, 547	
New Haven Clock Co. v. Koch- ersperger, 175 Ill. 383. 269, 272		Parkison v. Thompson, 164 Ind. 609.....	460
Newman v. Horner, 55 Ind. App. 298.....	174	Pattilo v. Alexander, 29 L. R. A. 616.....	319
— v. Newman, 69 Ill. 167. 399		Paul v. Town of Walkerton, 150 Ind. 565.....	335
New York, etc., R. Co. v. Doane, 115 Ind. 435.....	406, 413, 414	Paulsen v. Portland, 149 U. S. 30.....	349, 350
Nicholson v. Caress, 59 Ind. 39.....	78	Payton v. Monroe, 110 Ga. 262.....	641
Niles v. Davis, 60 Miss. 750.. 105		Peats Co. v. Bradley, 166 App. Div. 267.....	43
Noble v. Cromwell, 26 Barb. 475.....	447, 511	Peck v. Mallams, 10 N. Y. 509.....	60
Noble's Exrx. v. Noble, 19 Ind. 431.....	641	— v. Martin, 17 Ind. 115.. 6	
Nord v. Marty, 56 Ind. 531.. 167		Peffley v. Noland, 80 Ind. 164. 54	
Nysewander v. Lowman, 124 Ind. 584.....	50, 285, 373	Penn., etc., Glass Co. v. De LaVergne Mach. Co., 58 Ind. App. 333.....	301
O'Brien v. Higley, 162 Ind. 316.....	144	Pennsylvania Co. v. Congdon, 134 Ind. 226.....	412
— v. People, 17 Colo. 561. 299		— v. Reesor, 60 Ind. App. 636.....	417
O'Donahue v. Creager, 117 Ind. 372.....	108	People, ex rel. Port Chester Sav. Bank v. Cromwell, 102 N. Y. 477.....	330
Offutt v. Rucker, 2 Ind. App. 350.....	360	People's Nat. Bank, etc. v. State, 159 Ind. 353.....	684
Ogborn v. City of Newcastle, 178 Ind. 161.....	269	Pepper v. Zahnsinger, 94 Ind. 88.....	63
O'Hara v. Stone, 48 Ind. 417. 641		Peru Heating Co. v. Lenhart, 48 Ind. App. 319.....	412
Ohio Farmers Ins. Co. v. Vogel, 116 Ind. 239.....	540	Peters v. Bain, 133 U. S. 670. 285	
— v. Williams, (Ind. App.) 112 N. E. 556.....	543	Pfeiffer v. Crane, 89 Ind. 485. 694	
Ohio Oil Co. v. Detamore, 165 Ind. 243.....	600	Pfeil v. Kemper, 3 Wis. *315.. 7	
Ohlwine v. Pfaffman, 52 Ind. App. 357.....	50	Phenix Ins. Co. v. Hart, 112 Ga. 765.....	425
		Phoenix Ins. Co. v. Jacobs, 23 Ind. App. 509.....	73

Picard v. McCormick, 11 Mich. 68.....	54, 309
Pierce v. Vansell, 35 Ind. App. 525.....	62
— v. Walton, 20 Ind. App. 66.....	205
Pittsburgh, etc., R. Co. v. Cozatt, 39 Ind. App. 682.....	195
— v. Frazee, 150 Ind. 576.....	152, 153
— v. Hartford City, 170 Ind. 674.....	349, 350
— v. Hays, 17 Ind. App. 261.....	245
— v. Home Ins. Co., 183 Ind. 355.....	678
— v. Lighthouse, 168 Ind. 438.....	458
— v. Mitchell, 175 Ind. 196.....	217
— v. Muncie, etc., Traction Co., 174 Ind. 167.....	525
— v. Rose, 40 Ind. App. 240.....	408
Place v. Baugher, 159 Ind. 232.....	97
Place v. Minster, 65 N. Y. 89.....	160
Pluto Powder Co. v. Cuba, etc., Bank, 153 Wis. 324.....	320, 321
Poirer v. Carroll, 35 La. Ann. 699.....	204
Polk v. Faris, 9 Yerg. 210.....	473
Pond v. New Rochelle Water Co., 183 N. Y. 330.....	270, 272
Pope v. Voigt, 49 Ind. App. 176.....	480
Portland Nat. Gas & Oil Co. v. State, ex rel., 135 Ind. 54.....	270
Pottorf v. Fidelity Coal Min. Co., 86 Kan. 774.....	619
Potts v. Hartman, 101 Ind. 359.....	69
Powell v. Wright, 7 Beav. 444.....	440, 509
Prescott v. Haughey, 152 Ind. 517.....	631
Prest-O-Lite Co. v. Skeel, 182 Ind. 593.....	561, 697
Price v. Standard Life, etc., Ins. Co., 90 Minn. 264.....	425
Princeton Coal etc., Co. v. Downer, 48 Ind. App. 136.....	625
— v. Gilmore, 170 Ind. 366.....	42, 271
Pry v. Ramage, 176 Ind. 446.....	166
Puterbaugh v. Puterbaugh, 131 Ind. 288.....	118, 390
Quality Clothes Shop v. Keeney, 57 Ind. App. 500.....	556, 678
Racer v. State, ex rel., 131 Ind. 393.....	526
Radabaugh v. Silvers, 135 Ind. 605.....	3
Rader v. Barrett Co., 59 Ind. App. 27.....	375
Radican v. Buckley, 138 Ind. 582.....	41
Railway, etc., Assn. v. Robinson, 147 Ill. 138.....	425
Rambo v. Patterson, 133 Mich. 655.....	52
Randolph v. Casey, 43 W. Va. 289.....	106
Rannels v. Rannels, 52 Mo. 108.....	105, 108
Ratliff v. Baldwin, 29 Ind. 16.....	167
Rattagliata v. Hubbell, 7 Misc. Rep. 103.....	183
Ray v. Baker, 165 Ind. 74.....	51
— v. Moore, 24 Ind. App. 480.....	284
Reichert v. Geers, 98 Ind. 73.....	41
Reimard v. Bloomsburg, etc., R. Co., 228 Pa. 384.....	408, 409
Reimer's Appeal, 100 Pa. 182.....	352
Rennert v. Shirk, 163 Ind. 542.....	115, 118
Rensselaer v. Leopold, 106 Ind. 29.....	356
Repp v. Indianapolis, etc., Traction Co., — Ind. App. —.....	2
— v. Lesher, 27 Ind. App. 360.....	3
Richardson v. Pate, 93 Ind. 423.....	553
Richland School Tp. v. Overmyer, 164 Ind. 382.....	353
Ridley v. Halliday, 106 Tenn. 607.....	444, 505
Roach v. White, 94 Ind. 510.....	641
Roark v. Voshell, 58 Ind. App. 203.....	2
Robbins v. Springfield, etc., R. Co., 165 Mass. 30.....	183
Roberts v. Coleman, 37 W. Va. 143.....	78
— v. James, 83 N. J. Law 492.....	374, 376
— v. Roberts, 34 Miss. 322.....	644
Robinson v. Anderson, 106 Ind. 152.....	319
— v. Horner, 176 Ind. 226.....	458
— v. State, 177 Ind. 263.....	150
Robinson & Co. v. Ligon, 146 Mo. App. 634.....	591
Robison v. Swett, 3 Me. 316.....	116
Robling v. Board, etc., 141 Ind. 522.....	354
Roeder v. Keller, 135 Ind. 692.....	3
Roehl v. Haumesser, 114 Ind. 311.....	60, 62

Roehm v. Horst, 178 U. S. 1.	578, 579	Schoonover v. Reed, 65 Ind. 313.	296
Rogers v. Abbott, 37 Ind. 138. 61		Sears v. Board, 43 L. R. A. 834.	246
— v. John Weeks Lumber Co., 117 Wis. 5.	41	Sedwick v. Ritter, 128 Ind. 209.	108
Roots v. Beck, 109 Ind. 472.	115, 118	Shaffer v. Ryan, 84 Ind. 140.	5
Rose v. Hurley, 39 Ind. 77.	592	Shank v. Smith, 157 Ind. 401. 232	
— v. Owen, 37 Ind. App. 125.	553	Shaw v. Ayres, 17 Ind. App. 614.	205
Rosenfeld v. Peoria, etc., R. Co., 103 Ind. 121.	217	— v. Beers, 84 Ind. 528.	435, 502
Ross v. Hobson, 131 Ind. 166. 373		Shields v. State, 149 Ind. 395. 297	
— v. Van Natta, 164 Ind. 557.	72	Shimer v. Mann, 99 Ind. 190. 472	
Rotherock v. Carr, 55 Ind. 334.	128	Shippers, etc., Co. v. Davidson, 35 Tex. Civ. App. 558. 413	
Rothschild v. Leonhard, 33 Ind. App. 452.	115	Shirk v. Lingeman, 28 Ind. App. 630.	279
Rouyer v. Miller, 16 Ind. App. 519.	97	— v. Neible, 156 Ind. 66.	306
Roy v. Rowe, 90 Ind. 54.	466	Siberry v. State, 149 Ind. 684. 361	
Ruch v. Biery, 110 Ind. 444.	78	Simons v. Gaynor, 89 Ind. 165.	181
Rucker v. Steelman, 73 Ind. 396.	60	— v. Simons, 129 Ind. 248.	566, 567
Ruggles v. Tyson, 104 Wis. 500.	446, 508, 512	Simpson v. Simpson, 114 Ill. 603.	78
Rump v. Woods, 50 Ind. App. 347.	182	Sims v. Gay, 109 Ind. 501.	106
Runnels v. Kaylor, 95 Ind. 503.	62	— v. Hines, 121 Ind. 534.	244, 527
Runyan v. Snell, 116 Ind. 164.	319, 323	Skinner v. Spann, 175 Ind. 672.	466, 467
Russell v. Russell, 48 Ind. 456. 512		Slaughter v. State, ex rel., 132 Ind. 465.	526
Rutledge v. Fishburne, 97 Am. St., notes, 776, 767.	444, 509, 511	Sloan v. Sloan, 21 Ind. App. 315.	119
St. Clair v. Marquell, 161 Ind. 56.	657	Smiley v. Deweese, 1 Ind. App. 211.	205
St. Louis, etc., R. Co. v. Alexander, 227 U. S. 218.	217	Smith v. Andrew, 50 Ind. App. 602.	502
St. Vincent, etc., Co. v. Troy 76 N. Y. 108.	352	— v. Belshaw, 89 Cal. 427.	620
Sahm v. State, ex rel., 172 Ind. 237.	44	— v. Board, 6 Ind. App. 153.	244
Samuelson v. Cleveland, etc., Co., 49 Mich. 164.	620	— v. Borden, 160 Ind. 223.	590
Sanderson v. State, 169 Ind. 301.	160	— v. Finney, 56 Ind. App. 707.	297
Sands v. Davis, 40 Mich. 14. 146		— v. Hibben, 59 Ind. App. 438.	554
Schee v. McQuilken, 59 Ind. 269.	437	— v. Janes, 20 Wend. 192.	327, 329
Scheible v. Slagle, 89 Ind. 323. 60		— v. McDowell, 148 Ill. 51. 352	
Schilling v. Quinn, 178 Ind. 443.	488	— v. Meiser, 11 Ind. App. 468.	94
Schmidt v. City of Indianapolis, 168 Ind. 631.	349	— v. Palmer, 6 Cush. 513. 423	
Schoeller v. Metropolitan Express Co., 108 App. Div. 226.	183	— v. Parker, 148 Ind. 127.	304
		— v. Wells Mfg. Co., 148 Ind. 333.	66, 73
		Smoot v. Heyser's Exr. 113 Ky. 81.	644
		Snider v. Greer-Wilkinson Lumber Co., 51 Ind. App. 348.	595

Snodgrass v. Brandenburg, 164 Ind. 59.....	187, 190	Stevens v. Park, 73 Ill. 387.....	327
Snyder v. Frank, 53 Ind. App. 301.....	119, 120	Stiers v. Mundy, 174 Ind. 651.....	640
— v. Snyder, 25 Ind. 399.....	205	Stiles v. Hasler, 56 Ind. App. 88.....	150, 574
Sontag v. Klee, 148 Ind. 536.....	31	Stone v. Boston, etc., R. Co., 171 Mass. 536.....	410
Southern R. Co. v. Bretz, 181 Ind. 504.....	632	Stover v. City of Springfield, 167 Mo. App. 328.....	243, 244
— v. Utz, 52 Ind. App. 270.....	456	Strebin v. Lavengood, 163 Ind. 478.....	336
— v. Weidenbrenner, 61 Ind. App. 314.....	627	Stringer v. Frost, 116 Ind. 477.....	181
Spaulding v. Spaulding, 133 Ind. 122.....	397	Stroup v. Stroup, 140 Ind. 179.....	469
Spears v. Shaw, 118 S. W. 275.....	77	Struble v. Neighbert, 41 Ind. 344.....	61, 63
Spencer v. Ohio, etc., R. Co., 130 Ind. 181.....	395	Stubbs v. McGillis, 44 Colo. 138.....	488
Sperry v. Swiger, 54 W. Va. 283.....	644	Sullivan v. Indianapolis, etc., Traction Co., 55 Ind. App. 407.....	59
Spork v. International Harvester Co., etc., 58 Ind. App. 112.....	685	— v. Sullivan, 6 Ind. App. 65.....	120
Springs v. Scott, 132 N. C. 548.....	508	Sulzer-Vogt Machine Co. v. Rushville Water Co., 160 Ind. 202.....	381
Strader v. Strader, 151 Ind. 339.....	372	Sumner v. Stevens, 6 Met. 337.....	111
Stainback v. Bank, etc., 11 Va. 269.....	320, 321	Sutton v. Baldwin, 146 Ind. 361.....	360
Stamets v. Mitchenor, 165 Ind. 672.....	632	Swain v. Hardin, 64 Ind. 85.....	512
Standard Pottery Co. v. Moudy, 35 Ind. App. 427.....	396	Taber v. Ferguson, 109 Ind. 227.....	246
Stanhope v. Swafford, 80 Iowa 45.....	51	Talbot v. Meyer, 83 Ind. 585.....	449
Stanley v. Dailey, 112 Ind. 489.....	549	Taylor v. Buckner, 2 A. K. Marsh. (Ky.) 18.....	105, 108, 112
Starkey v. Starkey, 136 Ind. 349.....	390	— v. Duesterberg, 109 Ind. 165.....	119, 120
— v. —, 166 Ind. 140.....	632	— v. Griner, 55 Ind. App. 617.....	375
Starr v. Swain, 182 Ind. 313.....	3	Teabout v. Daniels, 38 Iowa 158.....	105, 108
— v. United States, 4 Ind. T. 550.....	299	Teal v. Richardson, 160 Ind. 119.....	472
State v. Cadwallader, 172 Ind. 619.....	271	Tennessee, etc., R. Co. v. Linn, 123 Ala. 112.....	105, 107, 108, 115
State v. Carnagy, 106 Iowa 483.....	299	— v. Paint Rock, etc., Transp. Co., 128 Tenn. 277.....	43
— v. Hammer, 116 Iowa, 284.....	299	Terre Haute, etc., R. Co. v. Buck, 96 Ind. 346.....	408, 416
State v. Hindman, 159 Ind. 586.....	233	— v. Zehner, 28 Ind. App. 229.....	279
State v. McCormick, 141 Ind. 685.....	92	Terre Haute, etc., Traction Co. v. Hunter, 62 Ind. App. 399.....	456
State v. Portsmouth Savings Bank, 106 Ind. 435.....	118	Tewksbury v. Howard, 138 Ind. 103.....	61
State, ex rel. v. Board, 153 Ind. 302.....	271	Texas, etc., R. Co. v. Bigger, 239 U. S. 330.....	408
— v. —, 165 Ind. 262.....	528		
— v. Central, etc., Bridge Co., 49 Ind. App. 544.....	96, 97		
— v. Goldthait, 172 Ind. 210.....	128		
— v. Weaver, 123 Ind. 512.....	607		
Stephenson v. Ballard, 82 Ind. 87.....	382		

Texas, etc., R. Co. v. Leggett, 86 S. W. 1066.....	425
Texas & Pac. Ry. v. Abilene Cotton Mills, 204 U. S. 426.....	214, 215
Thompson v. Midland, etc., Cement Co., 37 Ind. App. 459.....	31
— v. Newsom, 52 Ind. App. 444.....	553
— v. People, 144 Ill. 378.....	299
Thistlewaite v. Thistlewaite, 132 Ind. 355.....	94, 121
Tierney v. Brown, 65 Miss. 563.....	63
Tilden v. Louisville, etc., Co., 157 Ind. 532.....	152
— v. Whitley, etc., Co., 27 Ind. App. 53.....	361
Timmis v. Wade, 5 Ind. App. 139.....	304
Tippecanoe, etc., Co. v. Jester, 180 Ind. 357.....	418
Tobler v. Austin, 71 S. W. 407.....	425
Toledo, etc., Ins. Co. v. Speares, 16 Ind. 54.....	542
Tolley v. Thomas, 46 Ind. App. 559.....	115, 116
Toner v. Whybrew, 50 Ind. App. 387.....	382
Towell v. Hollweg, 81 Ind. 154.....	631
Tower v. Tower, 141 Ind. 223.....	435, 502
Town, etc. v. Gorman, 179 Ind. 1.....	232, 237, 250
Town of Cicero v. Lake Erie, etc., Co., 52 Ind. App. 298.....	354
Townsend v. Cleveland Fire Proofing Co., 18 Ind. App. 568.....	595
Traders' Ins. Co. v. Dobbins, 114 Tenn. 227.....	542
Traudt v. Hagerman, 27 Ind. App. 150.....	644
Tredwell v. City, 11 App. Div. 224.....	254
Trentman v. Neff, 124 Ind. 503.....	60
Trimble v. Stewart, 168 Mo. App. 276.....	238
Tron v. Lewis, 31 Ind. App. 178.....	692
Trull v. Eastman, 44 Mass. 121.....	78
Turpie v. Lowe, 158 Ind. 314.....	121
Tyler v. Anderson, 106 Ind. 185.....	51
Unger v. Mellinger, 43 Ind. App. 524.....	423
United States Cement Co. v. Cooper, 172 Ind. 599.....	35
United States, etc., Co. v. Clark, 41 Ind. App. 345.....	543
United Shoe Machinery Co. v. Brunet, A. C. 330.....	376
Vail v. Page, 175 Ind. 126.....	567
Vanceleave v. Milliken, 13 Ind. 105.....	105, 112
Vandalia Coal Co. v. Bland, 59 Ind. App. 308.....	2
Vandalia R. Co. v. Stillwell, 181 Ind. 267.....	201, 202
Van Gorder v. Smith, 99 Ind. 404.....	187, 190
Vernia v. Lawson, 54 Ind. 485.....	549
Vincennes Water Supply Co. v. White, 124 Ind. 376.....	562
Wabash, etc., R. Co. v. Rooker, 90 Ind. 581.....	205
Wabash R. Co. v. Gretzinger, 182 Ind. 155.....	626
— v. Priddy, 179 Ind. 483.....	213
— v. Thomas, 222 Ill. 337.....	217
Wagner v. McCool, 52 Ind. App. 124.....	323
— v. Wagner, 183 Ind. 528.....	678
Walker v. Hill, 111 Ind. 223.....	106
Wall v. Northern Pac. R. Co. 50 Mont. 122.....	217
Wallace v. Bank, 1 Ala. 565.....	320
Walling v. Morgan County, 126 Ala. 326.....	425
Walters v. Akers, 101 S. W. 1179.....	289
Waltz v. Waltz, 84 Ind. 403.....	119
W. & A. Pipe Lines v. Insurance Co., 145 Pa. 346.....	542
W. C. Hall Milling Co. v. Hewes, 57 Ind. App. 381.....	554
Ward v. Wiman, 17 Wend. 192.....	52
Warner v. Marshall, 166 Ind. 88.....	60
Waterman v. State, 116 Ind. 51.....	299
Waters v. Lyon, 141 Ind. 170.....	472
Watts v. Chicago, etc., R. Co., 61 Ind. App. 51.....	419
Weidenhamer v. State, 181 Ind. 349.....	459
Weis v. City of Madison, 75 Ind. 241.....	525
Welker v. Appelman, 44 Ind. App. 699.....	121
Wells v. Vandalia R. Co., 56 Ind. App. 211.....	164
West v. National Casualty Co., 61 Ind. App. 479.....	59, 538, 539
Western Ins. Co. v. Ashby, 53 Ind. App. 518.....	539, 543

Western Paving, etc., Co. v. Citizens St. R. Co., 128 Ind. 525.....	274	Wilson v. Campbell, 119 Ind. 286.....	106, 107, 112
Weston v. Stoddard, 20 L. R. A. 624, note.....	502	— v. Johnson, 145 Ind. 40.....	106, 107
— v. Syracuse, 158 N. Y. 274.....	246	Wilt v. Board, 54 Ind. App. 240.....	685
Wheatcraft v. Myers, 57 Ind. App. 371.....	589	Windmuller v. Pope, 107 N. Y. 674.....	584
Whitcomb v. Roll, 40 Ind. App. 119.....	382	Winslow v. Cooper, 104 Ill. 235.....	63
White v. State, ex rel., 183 Ind. 649.....	58	Wisdom v. Nichols, etc., Co., 139 Ky. 506.....	289
Whiteman v. Fayette Fuel-Gas Co., 139 Pa. 492.....	269	Wise v. Atlantic, etc., R. Co., 101 S. C. 510.....	217
Whitesell v. Strickler, 167 Ind. 602.....	631 632, 635	— v. Cleveland, etc., R. Co., 183 Ind. 484.....	361
White Water R. Co. v. Butler, 112 Ind. 598.....	408	W. McMillen & Sons v. Hall, 59 Ind. App. 545.....	180
Whitley v. Spokane, etc., R. Co., 23 Idaho 642.....	285, 286	Wolcott v. Ensign, 53 Ind. 70.....	153
Whitney v. State, 154 Ind. 573.....	93	Wolfe v. Pugh, 101 Ind. 293.....	160
Wickersham v. McGaughey, 55 Ind. App. 669.....	174	Woodrum v. Kirkpatrick, 2 Swan 218.....	472
Wiggins v. Holley, 11 Ind. 2.....	96	Woods v. Brown, 93 Ind. 164.....	487
Wilde v. Wilde, 2 Nev. 306.....	399	Worthley v. Burbanks, 146 Ind. 534.....	104, 115
Wiley v. Pratt, 23 Ind. 628.....	488	Wright v. Kleyla, 104 Ind. 223.....	106
Wilkinson v. Bottoms, 174 Ala. 122.....	105	— v. Wright, 97 Ind. 444.....	108
Williams v. Committee, etc., 92 Md. 497.....	189	Xenia Real Estate Co. v. Mac-ey, 147 Ind. 568.....	44
— v. Henderson, 90 Ind. 577.....	296	Yearley v. Sharp, 96 Ind. 469.....	566
— v. Hitzie, 83 Ind. 303.....	487	Yost v. Dunk, 57 Ind. App. 151.....	389
— v. Lowe, 49 Ind. App. 606.....	358	Young v. Forest Oil Co., 194 Pa. 243.....	600
— v. O'Keefe, 24 How. Pr. 16.....	184	Yuster v. Keefe, 46 Ind. App. 460.....	12
— v. Potter, 72 Ind. 354.....	332	Zimmerman v. Beatson, 39 Ind. App. 664.....	119
— v. Richards, 152 Ind. 528.....	31	Zorn v. Warren-Scharf Co., 42 Ind. App. 213.....	251
Williamson v. Holt, 147 N. C. 515.....	306	Zuck v. McClure, 98 Pa. 541.....	579, 585
Willman v. Willman, 57 Ind. 500.....	488		

STATUTES CITED AND CONSTRUED

24 Stat. at Large 387.....	214
34 Stat. at Large 595.....	214
Section 8592 U. S. Comp. Stat. 1913.....	214
Section 8595 U. S. Comp. Stat. 1913.....	214
Section 124a Burns 1914.....	501
Section 249 Burns 1914.....	43, 150, 437
Section 291 Burns 1914.....	40
Sections 292, 293 Burns 1914.....	41
Section 295, cl. 5, Burns 1914.....	360
Section 343a Burns 1914.....	40, 41
Section 344 Burns 1914.....	150, 316, 574
Section 348 Burns 1914.....	150, 212, 574
Section 350 Burns 1914.....	375
Section 352 Burns 1914.....	284
Section 368 Burns 1914.....	69
Section 370 Burns 1914.....	422
Section 391 Burns 1914.....	150, 152
Section 392 Burns 1914.....	6
Section 394 Burns 1914.....	503
Section 403 Burns 1914.....	122
Section 405 Burns 1914.....	165, 166, 488, 684
Section 407 Burns 1914.....	375
Section 501 Burns 1914.....	422
Section 521 Burns 1914.....	120
Section 522 Burns 1914.....	118, 120
Section 572 Burns 1914.....	417
Section 585 Burns 1914.....	361, 483
Section 587 Burns 1914.....	55, 449, 604
Sections 627, 628 Burns 1914.....	486, 487
Section 656 Burns 1914.....	3, 607
Section 671 Burns 1914.....	29
Section 674 Burns 1914.....	479
Section 677 Burns 1914.....	386
Section 678 Burns 1914.....	386
Section 681 Burns 1914.....	553, 554
Section 696 Burns 1914.....	605
Section 698 Burns 1914.....	459
Section 700 Burns 1914.....	375
Section 705 Burns 1914.....	386
Section 1080 Burns 1914.....	398
Section 1083 Burns 1914.....	397
Section 1108 Burns 1914.....	666
Section 1244 Burns 1914.....	437
Section 1261 Burns 1914.....	439
Section 1350 Burns 1914.....	478
Section 1354 Burns 1914.....	337
Section 1356 Burns 1914.....	554
Section 2977 Burns 1914.....	565, 566
Section 2978 Burns 1914.....	565, 566
Section 2980 Burns 1914.....	566
Section 2990 Burns 1914.....	77
Section 2996 Burns 1914.....	656
Section 3000 Burns 1914.....	630
Section 3001 Burns 1914.....	653, 656
Section 3016 Burns 1914.....	640, 641, 643, 644
Section 3046 Burns 1914.....	641, 642, 643, 644
Section 3047 Burns 1914.....	638, 641

Section 3123 Burns 1914.....	466
Section 3132 Burns 1914.....	77
Section 3299a Burns 1914.....	590
Section 3710a Burns 1914.....	524
Sections 3841-3847b Burns 1914.....	559
Section 3845 Burns 1914.....	559
Section 3862d Burns 1914.....	556, 560, 561, 563
Section 3994 Burns 1914.....	472
Section 4024 Burns 1914.....	468
Section 5195 Burns 1914.....	664
Section 5308 Burns 1914.....	163
Section 5901a-5901c Burns 1914.....	66
Section 5901b Burns 1914.....	66, 73
Sections 6021-6023 Burns 1914.....	335
Section 7483 Burns 1914.....	233
Section 8020a Burns 1914.....	201, 393
Section 8029 Burns 1914.....	34, 36
Section 8560 Burns 1914.....	614
Section 8569 Burns 1914.....	612, 613
Section 8571 Burns 1914.....	614
Section 8572 Burns 1914.....	614
Section 8575 Burns 1914.....	614
Section 8577 Burns 1914.....	614
Section 8578 Burns 1914.....	614
Section 8579 Burns 1914.....	613, 614
Section 8580 Burns 1914.....	613, 625
Section 8624a Burns 1914.....	619
Section 8652 Burns 1914.....	126, 129
Section 8683 Burns 1914.....	128, 129
Section 8696 Burns 1914.....	525, 672
Section 8700 Burns 1914.....	350, 351
Sections 8700-8709 Burns 1914.....	352
Section 8716 Burns 1914.....	527, 528
Section 8725 Burns 1914.....	251
Section 8747 Burns 1914.....	672
Section 8959 Burns 1914.....	350, 352
Section 8975 Burns 1914.....	524
Section 9089 Burns 1914.....	316
Section 9089c7 Burns 1914.....	324
Section 9089K3 Burns 1914.....	324
Section 9089n7 Burns 1914.....	325
Section 9089r2 Burns 1914.....	325
Section 9089a2 Burns 1914.....	325
Section 9089a3 Burns 1914.....	324
Section 9089y3 Burns 1914.....	324, 330
Section 9089z3 Burns 1914.....	324, 330
Section 10465 Burns 1914.....	180
Section 249 Burns 1908.....	43, 44, 150
Section 344 Burns 1908.....	150, 547
Section 348 Burns 1908.....	150, 212, 574
Section 1110 Burns 1908.....	547
Sections 4739-4764 Burns 1908.....	569
Section 8725 Burns 1908.....	251
Section 2649 Burns 1894.....	640
Section 249 R. S. 1881.....	43, 150, 437
Section 289 R. S. 1881.....	40
Sections 290, 291 R. S. 1881.....	41
Section 293 R. S. 1881.....	360
Section 339 R. S. 1881.....	150
Section 343 R. S. 1881.....	150, 212
Section 345 R. S. 1881.....	375
Section 347 R. S. 1881.....	284

Section 362 R. S. 1881.....	69
Section 364 R. S. 1881.....	422
Section 382 R. S. 1881.....	150
Section 383 R. S. 1881.....	6
Section 385 R. S. 1881.....	503
Section 394 R. S. 1881.....	122
Section 396 R. S. 1881.....	165, 488, 684
Section 398 R. S. 1881.....	375
Section 478 R. S. 1881.....	422
Section 498 R. S. 1881.....	120
Section 499 R. S. 1881.....	118, 120
Section 559 R. S. 1881.....	361, 483
Sections 600, 601 R. S. 1881.....	486
Section 626 R. S. 1881.....	3, 607
Section 632 R. S. 1881.....	29
Section 636 R. S. 1881.....	386
Section 637 R. S. 1881.....	386
Section 640 R. S. 1881.....	553
Section 655 R. S. 1881.....	605
Section 658 R. S. 1881.....	375
Section 663 R. S. 1881.....	386
Section 1042 R. S. 1881.....	398
Section 1045 R. S. 1881.....	397
Section 1062 R. S. 1881.....	666
Section 1064 R. S. 1881.....	547
Section 1187 R. S. 1881.....	437
Section 1204 R. S. 1881.....	439
Section 1280 R. S. 1881.....	478
Section 1283 R. S. 1881.....	337
Section 1285 R. S. 1881.....	554
Section 2376 R. S. 1881.....	77
Section 2454 R. S. 1881.....	565
Section 2457 R. S. 1881.....	566
Section 2467 R. S. 1881.....	77
Section 2472 R. S. 1881.....	656
Section 2476 R. S. 1881.....	653
Section 2485 R. S. 1881.....	640
Section 2567 R. S. 1881.....	466
Section 2958 R. S. 1881.....	472
Section 2981 R. S. 1881.....	468
Section 3073 R. S. 1881.....	524
Section 3903 R. S. 1881.....	664
Section 4924 R. S. 1881.....	233
Sections 5772-5774, R. S. 1881.....	335
Section 9 Stat. 1824.....	653
Acts 1867 p. 33.....	524
Acts 1881 [ss] p. 240.....	150
Acts 1891 p. 71.....	640
Acts 1897 p. 128.....	417
Acts 1897 p. 318.....	569
Acts 1899 p. 5.....	479
Acts 1899 p. 231.....	34
Acts 1901 p. 118.....	640, 644
Acts 1901 p. 288.....	630
Acts 1903 p. 341.....	459
Acts 1905 p. 65.....	612, 613
Acts 1905 p. 219.....	126, 128, 524
Acts 1905 p. 278.....	525, 672
Acts 1905 p. 282.....	350, 352
Acts 1905 p. 322.....	672
Acts 1907 p. 46.....	163
Acts 1907 p. 73.....	638, 641

Acts 1907 p. 563.....	251
Acts 1909 p. 302.....	559
Acts 1909 p. 328.....	681
Acts 1909 p. 339.....	501
Acts 1909 p. 423.....	527
Acts 1911 p. 145.....	201, 393
Acts 1911 p. 415.....	43, 150, 316, 212, 574
Acts 1911 p. 437.....	66
Acts 1911 p. 539.....	524
Acts 1911 p. 597.....	556
Acts 1911 p. 626.....	612
Acts 1911 p. 658.....	619
Acts 1913 p. 12.....	350
Acts 1913 p. 48.....	590
Acts 1913 p. 65.....	565
Acts 1913 p. 120.....	316
Acts 1913 p. 132.....	325
Acts 1913 p. 135.....	324
Acts 1913 p. 136.....	324
Acts 1913 p. 149.....	325
Acts 1913 p. 150.....	325
Acts 1913 p. 179.....	180
Acts 1913 p. 848.....	55, 449, 604
Acts 1913 p. 850.....	40

TEXT-BOOKS CITED

1 Am. and Eng. Ency. Law 848.....105	7 Cyc 806, 807.....332
— 852.....108	12 Cyc 1066, 1067, 1068... 542
6 Am. and Eng. Ency. Law 864, 865.....159	13 Cyc 109.....667
7 Am. and Eng. Ency. Law (1st ed.) 1011, 1012.....541	15 Cyc 259.....285
11 Am. and Eng. Ency. Law (2d ed.) 388-399.....145	16 Cyc 87, 88.....355
16 Am. and Eng. Ency. Law 440-443.....455	16 Cyc 113.....43
20 Am. and Eng. Ency. Law (2d ed.) 590.....145	16 Cyc 602.....434, 499
21 Am. and Eng. Ency. Law 1142.....432	16 Cyc 616.....470, 512
24 Am. and Eng. Ency. Law 397.....433, 496	16 Cyc 639.....512
— 730.....93	16 Cyc 915.....171
29 Am. and Eng. Ency. Law 393-396.....542	16 Cyc 1196, 1216.....425
76 Am. St. 383, 393, 394, notes.562	16 Cyc 852.....170
Angell on Limitations (3d ed.) 503.....111	20 Cyc 9.....252
2 Ann. Cas. 275, 280, 283.....540	20 Cyc 87.....50
13 Ann. Cas., notes, 541, 542.540	20 Cyc 89.....52
1 Beach, Contracts §413.....579	22 Cyc 760.....673
Benjamin, Sales, §610.....590	23 Cyc 1238-1253.....93
Bigelow, Estoppel (2d ed.) 239.....145	28 Cyc 290.....349
3 Burns, Indiana Digest 635... 44	28 Cyc 1065, 1069.....625
Buswell, Limitations and Ad- verse Possession §§264, 265, 267, 268.....105	28 Cyc 1079.....527
Butler, Notes to Fearnce on Cont. Rem. §187.....496	29 Cyc 852.....396
Century Dictionary and Ency.666	29 Cyc 1167, 1173, 1184, 1185. 41
2 C. J. 168.....106, 107	30 Cyc 169.....501
2 C. J. 172, 177, 189.....106	30 Cyc 170.....436
2 C. J. 176.....106	30 Cyc 178.....502
2 C. J. 184, 185, 188-191, 198.108	30 Cyc 205.....444
2 C. J. 196.....105	30 Cyc 291.....512
2 C. J. 170, 196, 198.....105	30 Cyc 447.....516
3 C. J. 669.....31	31 Cyc 431.....284
3 C. J. 679-686.....32	31 Cyc 556.....69
Clark, Contracts (3d ed.) 295.374	38 Cyc 185.....12
3 Cooley, Briefs on Insurance 2549.....542	40 Cyc 1987.....649
Cooley, Taxation (2d ed.) 672.238	1 Daniel, Neg. Inst. §290.320, 321
Crawford, Negotiable Instru- ment Law §186.....326	2 Daniel, Neg. Inst. §§1586, 1601.....327
5 Cyc 531.....326	— §1596.....330
5 Cyc 532.....327	2 Daniel, Neg. Inst. (5th ed.) §1601.....330
6 Cyc 488.....262	2 Devlin, Deeds (3d ed.) §§1010-1019.....63
6 Cyc 541.....406	Elliott, App. Proc. §186.....196
	— §318.....632
	— §350.....298
	Elliott, Contracts §84.....306
	Elliott, Contracts §4905.....516
	Elliott, Contracts §4953.....516
	2 Elliott, Contracts §1651.....52
	3 Elliott, Contracts §§2028, 2029.....578
	1 Elliott, Evidence §§454-456, 459-462... 97
	— §461.....96
	2 Elliott, Evidence §§1476, 1477, 1478.....96

Elliott, Roads and Sts. §382..	239	1 Parsons, Contracts *580....	592
Elliott, Roads and Sts. (2d. ed.) §586.....	252	1 Parsons, Notes and Bills 54.	360
1 Ency. Ev. 602.....	423	Pomeroy, Eq. Jurisp. (2d ed.) §1387.....	503
2 Ency. Ev. 264.....	96		
7 Ency. Pl. and Pr. 363, 364..	285	2 Randolph, Commercial Paper §1106.....	327
11 Ency. Pl. and Pr. 164.....	396	1 R. C. L. 706, 707.....	107
Ewbank's Manual §150.....	342	1 R. C. L. 708.....	105
Ewbank's Manual (2d. ed.) §§112, 112a, 227.....	31, 32	1 R. C. L. 717.....	115
— §138.....	632	2 R. C. L. 325.....	262
— §242.....	310	2 R. C. L. 1183.....	181
Fearne, Cont. Rem. 9... 433, 496		3 R. C. L. 1224.....	327
2 Fearne, Remainders §463..	468	4 R. C. L. 909.....	213
Freeman, Coten. and Part. §420.....	501	4 R. C. L. 920.....	217
Freeman, Coten. and Part. (2d ed.) §§428, 429, 449..	436	5 R. C. L. 941, 942.....	8
— §§440, 446.....	502, 503	6 R. C. L. 932.....	374
— §482.....	442, 509	10 R. C. L. 652.....	434, 499
Freeman, Execution §281....	63	Schouler, Personal Property §606.....	592
1 Freeman, Judgments (4th ed.) §159.....	93	Sedgwick & Wait, Trial of Titles §§772, 773.....	105, 106
1 Greenleaf, Evidence §§115-120.....	97	Smith, Law of Frauds 3.....	355
High on Injunctions (4th ed.) §23.....	268	2 Smith, Leading Cases (8 Am. ed.) §711.....	105
Hogate, Pl. and Pr. §353....	171	Story, Eq. Pleading §§145, 146.....	442, 509
1 Hogate, Pl. and Pr. §412....	69	Thompson, Negligence §§196, 197, 2927.....	195
Hutchinson, Carriers (3d ed.) §1126.....	414	3, 8 Thompson, Negligence (2d ed.) §2779.....	455
Joyce, Defenses Com. Paper §585.....	327	Tiedeman, Commercial Paper §77.....	320
Lindley, Part. (8th ed.) 466, 656.....	516	—, §442.....	327
65 L. R. A. 480, note.....	562	Tiedeman, Real Prop. §336, 211.....	434, 499
14 L. R. A. (N. S.) 213.....	487	Tiedeman, Sales §180.....	592
4 McQuillan, Municipal Corp., §1929.....	254	Webster's Dictionary.....	317
— 3573.....	271	2 White and Tudor, Leading Cases in Eq. 894.....	503
Mechem, Sales §1224.....	590	White's Supplement §48.....	413
1 Morse, Banks and Banking (4th ed.) §262.....	330	1 Wigmore, Evidence §§656-659, 666.....	96
Page, Contracts §61.....	592	Wood's Byles, Bills and Notes (8th ed.) 19.....	326
Page, Wills §507.....	434, 499	6 Words and Phrases 5758, 5759.....	411
Page & Jones, Taxation by Assessments §527.....	239	1 Works' Practice §177.....	43
— §537.....	253	1 Works' Practice (3d ed., 280.....	205
— §868.....	246		

CASES DECIDED
IN THE
APPELLATE COURT

OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1915, AND MAY
TERM, 1916, IN THE ONE HUNDREDTH YEAR
OF THE STATE.

JOSEPH ET AL. v. HORODESKY ET AL.

[No. 9,027. Filed May 10, 1916.]

APPEAL.—*Briefs.—Insufficiency.*—Appellant's brief, containing no statement of the errors assigned or relied on for reversal, no statement of the record showing any error or exception relied on, and no statement of the issues or decision, wholly failed to comply with Rule 22, and no question was presented thereby.

From Starke Circuit Court; *Francis J. Vurpillat*, Judge.

Action between Jacob Joseph and another, and Juda Horodesky and others. From the judgment rendered Jacob Joseph and another appeal. *Affirmed.*

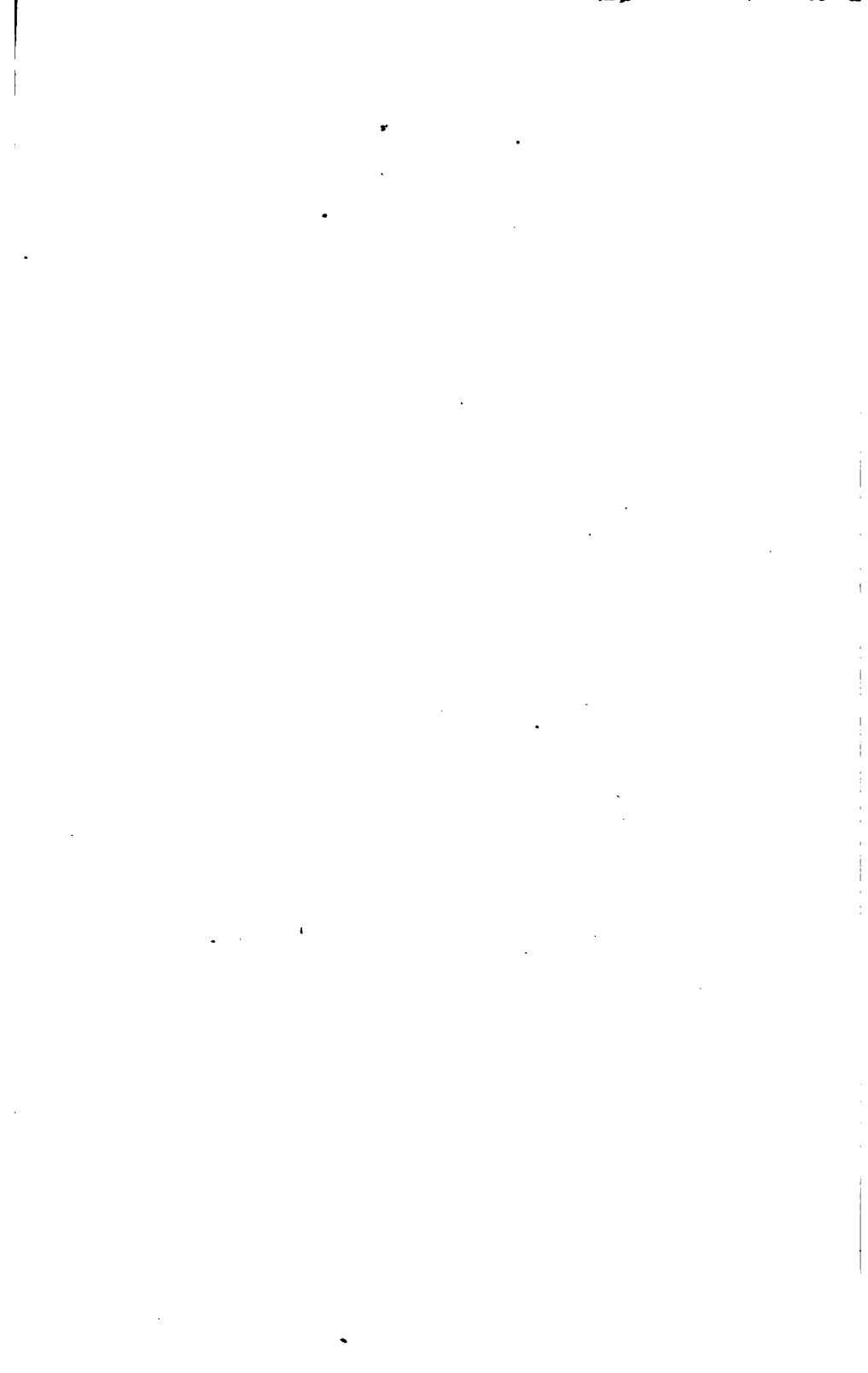
Daniel A. Levy and *W. C. Pentecost*, for appellants.
Charles Hamilton Peters, for appellees.

IBACH, C. J.—Under Rule 22 of the Supreme and Appellate Courts, the briefs in this case present no question to this court for determination. Appellants' brief contains no statement whatever of the errors assigned or relied on for reversal, no statement of the record showing any error or exception relied on, and no statement of the issues or decision. It contains merely what is called a statement of facts consisting of counsel's deductions from the evidence, followed by quotations from certain



HARVARD LAW LIBRARY

Received APR 12 1918



the first paragraph of complaint. There is no dispute about the services having been rendered by appellee; that he charged appellant therefor the sum of \$300; that such services were worth that sum; that he was paid on his individual account the sum of \$125, leaving a balance unpaid of \$175.

We are also of the opinion that there is no proof whatever to disclose the value of the services rendered by Doctor Stookey, which claim

2. was assigned to appellee, and sued on in the second paragraph of complaint. In the absence of an express agreement, one that brings to such a service as was rendered by him due care and skill can recover the reasonable and customary price therefor, but such reasonable and customary fee must be shown by competent evidence. Proof of the price charged by the claimant, without any proof of the value of the service performed, is not sufficient, and does not meet the test. *Peck v. Martin* (1861), 17 Ind. 115; *Board, etc. v Chambers* (1881), 75 Ind. 409. Appellee takes the position that as each paragraph of the complaint

3. contains a statement of the account sued on, and each paragraph was duly verified, and as the appellee did not introduce evidence to refute the averments of the complaint, the case falls within the provisions of §392 Burns 1914, §383 R. S. 1881. The difficulty with this position is that the statute referred to is applicable to default cases, while in the case at bar, there was an appearance and an answer in general denial filed, which cast the burden on appellee who claimed the amount sued for in the second paragraph of complaint to prove the value of the services rendered, as was done to support the first par-

4. agraph. There is no presumption that the items of an account that is made a part of

a pleading are correct, or, as in this case, that the services rendered were worth the amount charged, but such facts must be proven, the same as all other facts necessary to be proven to support such causes of action when there is an appearance and an answer denying the right to recover has been filed. *French v. Frazier* (1832), 30 Ky. *425; *Pfeil v. Kemper* (1854), 3 Wis. *315. Our disposition of this branch of the case eliminates the necessity of considering any of the remaining alleged error directed thereto.

Appellant further contends that the trial court erred in allowing interest as a part of the judgment. It is argued that because the debt sued on was contracted in the state of California, and the

services were to be performed there, the
5. legal rate of interest only as allowed in that state would control, and since the statute of California was not pleaded and no evidence showing the legal rate of interest of that state, and there being no provision for the collection of interest under the common law, none should have been allowed. This question was before our Supreme Court in the case of *Kopelke v. Kopelke* (1887), 112 Ind. 435, 13 N. E. 695. This language is there used: "Here, however, the notes sued upon were not, in terms, made payable at any specified place in the State of Michigan or elsewhere. * * * They were each payable generally and each of them was wholly silent upon the subject of interest. Notes thus payable are payable everywhere, and as a general rule the *lex fori*, and not the *lex loci contractus* governs in the collection thereof." The same rule necessarily applies to contracts such as those involved in the present case. In such cases where no interest has been contracted for and no place is fixed for the payment

of the debt, the interest recoverable after the breach of the contract is recoverable, if allowed, as damages; and if interest is so adjudged as a part of the judgment, the rate of interest will be controlled by the law of the place of the suit, which in this case was the domicile of the defendant. The interest

6. is not allowable on the theory that it is an incident to the original debt, but because of the delinquency on the part of the debtor and without such interest the claimant would not be made whole. 5 R. C. L. 941, 942, and cases cited. The account sued on in the first paragraph of the complaint became liquidated when the same was presented for payment and accepted and a partial payment made, and the trial court properly allowed interest at the rate allowable in this State as a part of the judgment.

The judgment is affirmed as to the amount rendered on the first paragraph of the complaint, upon condition that within thirty days from this date appellee enters upon the judgment docket of the court below a remittitur of the amount rendered on the second paragraph of complaint, and files the certificate of the clerk of such court with the clerk of this court showing that such remittitur has been so made; otherwise the cause will be reversed at costs of appellee.

NOTE.—Reported in 112 N. E. 830. Contracts of physicians and surgeons with patients, 33 Am. Rep. 736. Whether contemporaneous promise of one person to pay where benefit inures to another as a promise to answer for default of another is within the statute of frauds, 15 L. R. A. (N. S.) 214, 32 L. R. A. (N. S.) 598.

KOEHLER v. HALLER ET AL.

[No. 9,036. Filed May 11, 1916.]

1. TRUSTS.—*Constructive Trust.*—*Fiduciary Relation.*—The mere fact that a grantee had been the grantor's counsel prior to the date of the conveyance would not of itself establish a fiduciary re-

Koehler v. Haller—62 Ind. App. 8.

lationship, nor lay a sufficient foundation for a court of equity to decree the existence of a constructive trust in favor of grantor. p. 12.

2. TRUSTS.—*Constructive Trust.—Fiduciary Relation.*—Generally, where a person has rights and duties, which he is bound to exercise for another, a fiduciary relation may be said to exist, but to warrant the declaration of a constructive trust, it is essential to such relation that there exist a confidence by one of the parties in the other, and conditions giving to one an advantage over the other. p. 12.
3. MORTGAGES.—*Absolute Deed.—Oral Agreement.*—In a suit to have certain conveyances absolute on their face declared mortgages, where it appeared that they were made when grantor was financially embarrassed in order to have the property applied to the payment of his debts, and the testimony of grantee showed that the conveyances were intended to be absolute, while that of grantor was to the effect that any portion remaining after the payment of the debts was to be reconveyed, and it further appeared that the indebtedness discharged was a fair consideration for the property at the time of the conveyance; that grantor's knowledge of the value was equal to that of the grantee; and that grantor delayed for many years to assert his claims, the judgment of the trial court against the grantor was warranted. pp. 12, 14.
4. APPEAL.—*Review.—Questions of Fact.—Conflicting Evidence.*—It is not the province of the court to weigh conflicting evidence. p. 14.

From Allen Circuit Court; *Carl Yaple*, Judge.

Action by John A. Koehler against Gottlieb Haller and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

John H. Aiken and *Phil B. Colerick*, for appellant.

Owen N. Heaton, *Guy Colerick* and *Henry G. Hogan*, for appellees.

MORAN J.—In the latter part of the year of 1899, appellant conveyed to appellee, James E. K. France, certain real estate in the city of Fort Wayne, Indiana, by two separate deeds, which, in the court below, he unsuccessfully sought to have declared mortgages, asking also therein for an accounting. The question for review arises upon the action of the court in overruling appellant's motion for a new trial, under which it is claimed that the deci-

sion of the court is not sustained by sufficient evidence and is contrary to law.

A brief statement of the complaint will be helpful to an intelligent understanding of the questions presented, which follows: On September 5, 1899, appellant was indebted to numerous persons in the city of Fort Wayne, among whom were appellees; and in order to secure the indebtedness and provide a fund for the payment thereof, it was agreed between appellant and appellees that appellant would convey his real estate, consisting of several parcels in different additions in the city of Fort Wayne, a major portion of which was platted into lots, to appellees with power to sell a sufficient amount to satisfy appellant's indebtedness, with the further agreement that they would account to appellant for the balance of the proceeds not required in the payment of the same, and if any of the real estate remained unsold after the debts had been paid it was to be reconveyed to appellant; that appellees received for real estate sold the sum of \$10,000, which was sufficient to and did discharge all of appellant's indebtedness; that certain described parcels of real estate remained unsold, and a reconveyance and an accounting were demanded by appellant, but that such reconveyance and accounting were refused; that the deed so far as it covered the unsold real estate was asked to be declared a mortgage, and that appellees were asked to render an accounting to appellant as to the proceeds that came into their hands, and that a commissioner be appointed to make a conveyance of the unsold real estate on failure of appellees to do so. The issues were closed by an answer of general denial, and from the evidence admitted in support of the issues thus joined, the facts uncontroverted may be summed up as

follows: Appellant at the date of the conveyance of the real estate in question and prior thereto was in failing circumstances financially, being indebted in a large sum of money to creditors residing in Fort Wayne; that he owned considerable real estate, much of which was incumbered by mortgage; two deeds of conveyance were executed by appellant on September 5, and December 15, 1899, respectively, covering different parcels of appellant's real estate; that the conveyances were taken in the name of appellee France, who had been appellant's counsel for some time prior thereto; appellees were sureties on certain obligations due and owing by appellant.

The relation of attorney and client existing between appellant and appellee France prior to the time of the conveyance in question is a situation that forms the basis of an argument by appellant that the burden was upon appellee France under the law to show that he acted throughout the entire transaction in the utmost good faith; that he derived no advantage by reason of the superior position he occupied; that the relation being fiduciary, a court of equity will, if necessary, in order to work out justice as between the parties, decree the existence of a constructive trust. And aside from the contention that the relationship between appellant and appellee France was fiduciary, appellant presses the further contention that the relation that existed between appellant and appellee was that of surety and principal, and while the deeds of conveyance were absolute on their face, they were no more than mortgages indemnifying appellees.

From an abstract point of view we need not stop to determine the soundness of the equitable propositions thus announced by appellant; it is

sufficient to say that before they can be invoked in the case at bar, it must appear that the facts warranted their application. The mere fact that appellee France had been appellant's counsel

1. prior to the date of the conveyance in question would not of itself have established a fiduciary relationship at the time of the conveyance, nor lay a sufficient foundation for a court of equity to decree the existence of a constructive trust in favor of appellant. No invariable rule can be laid down by which to determine the existence of a fiduciary relationship; however, where a person has

2. rights and duties, which he is bound to exercise for the benefit of another, it can be said generally that a fiduciary relation exists, but in this connection there must also exist confidence of the one in the other, together with conditions giving to the one an advantage over the other, and this might be by reason of the superior intelligence of the one over the other, or a superior knowledge of the facts involved in a business transaction. 38 Cyc 185; *Yuster v. Keefe* (1910), 46 Ind. App. 460, 90 N. E. 920. This leads to the inquiry as to what were the real facts and circumstances surrounding the transaction, which gave rise to the conveyance of the real estate and the consideration therefor as between appellant and appellees. It is disclosed by the testimony

3. of appellee France that prior to the first conveyance, which included what is known as the Hood outlots and property in two other additions, that appellant informed him that he was pressed by certain of his creditors, and that he was unable to meet the obligations then due, which included a mortgage incumbrance on a part of the real estate mentioned, and the notes upon which appellees were sureties for appellant; that the

indebtedness for which appellant was being pressed, consisting of several different obligations, was gone over and totalled by appellant and himself; and that he was asked by appellant to take the real estate and pay the indebtedness then due, appellant stating that he wanted to be relieved from further embarrassment; thereupon appellee Haller was consulted, but would not join with the witness in agreeing to discharge the indebtedness for the real estate; likewise a creditor by the name of Zoeller was called upon and requested to take the real estate in consideration of discharging the indebtedness, but he would have nothing to do with the same; the witness feeling that this was the only way that he could save himself and his coappellee, if at all, took the conveyance and thereafter discharged the indebtedness as he agreed to do. Some time prior to the date of the second conveyance, appellant again called on the witness and informed him that he was again hard pressed by his creditors, and without any funds to discharge his indebtedness, and the firm of Grasser & Brandt, another of appellant's creditors joined with appellant in discharging the balance of appellant's indebtedness in consideration of a conveyance of the real estate described in the deed of December 15, 1899; that at no time did the witness agree to reconvey the real estate to appellant after discharging the indebtedness; that the same was conveyed in consideration of a discharge of appellant's indebtedness. As to being pressed by his creditors and unable to meet his obligations, there is no discrepancy between appellant's version of the transaction and that of appellee France. They differ only as to whether there was an agreement to reconvey any part of the real estate. Appellant testified that there was to be a reconveyance of that part of the real estate, if any, not re-

quired to discharge the indebtedness; while on the part of appellee France, the conveyance was an absolute one, with no agreement to reconvey. The

record in this particular shows a sharp dis-

4. pute, therefore we need proceed no further with this branch of the case, as it is not within the province of this court to decide the conflict. *Barnes v. Stock* (1912), 51 Ind. App. 640, 100 N. E. 98.

That the burden was on appellees to establish that appellee France acted in good faith and took no advantage of the situation, as contended for

3. by appellant, could have no application until it had been established that a fiduciary relation existed between appellant and appellee France; and further, the finding being general, and there being no objections to the order of the admission of the evidence, even if appellant's position be correct that the burden was upon the appellees to establish the good faith of the transaction, we can not say that the trial court in reaching its conclusion did not place such burden upon appellees. From an examination of the record we are satisfied that the evidence was sufficient to have placed the burden upon appellees without changing the result of the trial court's decision. From the evidence, the amount of the indebtedness discharged by appellee France seems to have been a fair consideration of the real estate at the time it was conveyed; the knowledge appellant had of its value and of the entire transaction was equal to that of appellee France, and the agreement from the facts in the record impresses us as having been openly entered into and in good faith, and this view is strengthened by reason of the long delay of appellant in asserting what he now regards as his rights.

National Live Stock Ins. Co. v. Simmons—62 Ind. App. 15.

A correct result was reached by the trial court. Judgment affirmed.

NOTE.—Reported in 112 N. E. 527. Equitable mortgages, what constitutes, 4 Am. St. 696. Deeds absolute in form with agreements to reconvey, 17 Am. Dec. 300. Right of an attorney to purchase or lease in his own behalf property which he was under no duty to purchase or lease for his client, 47 L. R. A. (N. S.) 567. Grantee's oral promise to grantor to hold in trust as giving rise to constructive trust, 39 L. R. A. (N. S.) 906. Whether a deed absolute on its face, but intended as a mortgage, conveys legal title, 11 L. R. A. (N. S.) 209. Price as consideration in determining whether a deed was intended as a mortgage, 20 Ann. Cas. 1199.

NATIONAL LIVE STOCK INSURANCE COMPANY v.
SIMMONS.

[No. 8,915. Filed January 14, 1916. Rehearing denied March 16, 1916. Transfer denied May 12, 1916.]

1. INSURANCE.—*Live Stock Insurance.—Breach of Warranty.—Estoppel.*—Where it appeared that plaintiff in an action on a policy of live stock insurance was illiterate; that the application was not read to him; that he truthfully and in good faith answered such questions as were asked by defendant's agent; and the circumstances were such as to warrant his belief that the agent had recorded the answers correctly, the defendant was estopped to rely upon alleged breaches of the warranty contained in such application. p. 16.
2. INSURANCE.—*Live Stock Insurance.—Forfeiture.—Notice of Sickness of Animal.*—Provisions in live stock policies requiring the insured to forthwith give notice of the sickness of the animal insured are to be construed as requiring notice within a reasonable time, so that where the animal insured became sick at two o'clock in the afternoon and died at midnight, and the owner was so situated that he could neither telegraph nor telephone to defendant company, and he and the veterinary worked with the animal until it died, and on the next day he notified the defendant and made proof of loss, the notice was timely within the provisions of a policy requiring notice of sickness to be given forthwith either by telephone or telegraph. p. 18.

From Gibson Circuit Court; *Simon L. Vandever*, Judge.

Action by John J. Simmons against the National

National Live Stock Ins. Co. v. Simmons—62 Ind. App. 15.

Live Stock Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

M. S. Meyberg, for appellant.

Claude A. Smith and Marsh T. Lewis, for appellee.

IBACH, C. J.—This was an action to recover on a policy of insurance issued to appellee by appellant on the life of a mare named “Dove.” In its second paragraph of answer, appellant averred that the policy provided that “the perils indemnified against by this policy do not include death from any cause where the assured does not render forthwith by telegraph or telephone” to the company at its home office, notice of any sickness or accident of the animal insured; that the horse became sick at two o’clock in the afternoon, and died that night at midnight, but appellee did not render notice of the sickness until after the animal’s death. In its third paragraph, it averred that appellee warranted in his application for insurance that he had mortgaged the horse for \$75, when in fact it was mortgaged for \$91. In its fourth paragraph, it was alleged that appellee warranted that he had not lost any live stock in the two years last past, but that he had lost two animals in the two years last past. There was a reply in general denial and that appellant was estopped to rely upon the breach of warranty for the reason that appellant’s agent had prepared the application and that appellee had given correct answers as to the facts. Appellee recovered judgment for \$101.87 and costs. The only error assigned is the overruling of appellant’s motion for new trial.

As to the alleged breaches of warranty, it appears from the evidence that the agent of appellant who filled in all the blanks did not ask appellee

1. whether he had lost any animals during the past two years, and that the only question asked

him concerning the mortgage was as to how much money he was getting from the mortgagee, and he answered that he was getting \$75, which was true, although the mortgage was for \$91; that appellee, an uneducated man who can not read writing, did not read the application, nor was it read to him, but he signed it and afterwards the policy was left in the possession of the mortgagee of the horse. The insured fully, truthfully, and in good faith answered all the questions asked him by the agent, and he had a right to believe that the agent had recorded his answers correctly, and that he had asked all the questions required. "If the applicant for insurance, in good faith, gives truthful answers to such questions as are asked him, but the agent, whether purposely or not, but without the knowledge or connivance of the assured, inserts false answers, the wrong is that of the company and not that of the assured. The company will be estopped to attribute wrong to the assured. * * * Nor can it be said that the assured, who has fully, frankly, truthfully and in good faith answered all the required questions, is guilty of negligence in signing, without reading, the application which is thereupon prepared by the agent. He is justified in assuming that the agent has with equal good faith truthfully recorded the answers given. He may well say to the company, 'You accredited this man to me as your representative and I signed the application thus prepared by him, relying upon the character which you gave him when you commissioned him to come to me as your agent. If he acted dishonestly in the matter, you and not I must suffer the consequences.' * * * Nor is it material in this case whether the untruthful answer

was thus written from dishonest motives, or merely through mistake. The party whose act it was can not complain that the other party to the contract was guilty of negligence in trusting either his honesty or his accuracy." *Germania Life Ins. Co. v. Lunkenheimer* (1891), 127 Ind. 536, 542, 26 N. E. 1082. See, also, *Michigan Mut. Life Ins. Co. v. Leon* (1894) 138 Ind. 636, 645, 37 N. E. 584; *Bowlus v. Phoenix Ins. Co.* (1892), 133 Ind. 106, 117, 32 N. E. 319, 20 L. R. A. 400; *Continental Ins. Co. v. Chew* (1894), 11 Ind. App. 330, 332, 38 N. E. 417, 54 Am. St. 506; *Home Ins. Co. v. Sylvester* (1900), 25 Ind. App. 207, 211, 57 N. E. 991. The evidence was sufficient to show that the company was estopped from relying upon the breach of warranty.

Upon the question of notice, the evidence is that the mare became sick about two o'clock in the afternoon; that appellee lived four miles from the town of Princeton, and could not send a
2. telegram on the day the horse died; that he tried to telephone to Princeton, but could not get through; that he finally reached a veterinary by telephone, who arrived at four o'clock; that the veterinary and appellee worked with the mare until she died about midnight, and it was not safe for either to leave her before that time. Appellee notified appellant the next day and furnished proofs of loss, and appellant disclaimed liability. In the recent case of *National Live Stock Ins. Co. v. Bartlow* (1915), 60 Ind. App. 233, 110 N. E. 224, this court in construing a similar provision requiring notice, said: "The language of the policy literally interpreted would require notice in case of sickness, however trivial, and that such notice be given by instantaneous action. The language, however, should receive a reasonable interpretation. * * * Nor should it be so interpreted as to require notice

simultaneous with the manifestation of the physical disorder, and regardless of attending circumstances * * *. In contracts of various kinds, the phrase 'at once' is construed as synonymous with 'immediately', 'forthwith', etc., where the subject-matter is the giving of notice. It is held that the use of such a term does not ordinarily call for instantaneous action, but rather that notice shall be given within such time as is reasonable in view of the circumstances. * * * In determining the question of reasonable time here, we can not lose sight of the fact that the policy, while it may not require it in all cases, plainly contemplates that notice of sickness should be given before the decease of the animal. In some cases, however, death might follow so rapidly on the footsteps of the sickness as that prior notice of the sickness would not be reasonably possible. * * * In our judgment, however, the phrase 'at once' as used in the policy should be construed * * * that such phrase calls for reasonable promptness of action, rather than instantaneous action. In determining what action is reasonable, regard should be had to the provisions of the policy, the symptoms manifested by the sick animal, and the surrounding circumstances." The circumstances shown by the evidence are such that it was practically impossible for appellee to have given the required notice before the death of the animal, and it appears that his entire time during the brief sickness before its death was taken up in giving it necessary attention. In view of such circumstances, we hold that the notice was given within reasonable time. Judgment affirmed.

NOTE.—Reported in 111 N. E. 18. When concealment or misrepresentation avoids insurance policy, 35 Am. Rep. 629. Effect of agent's insertion in the application of false answers to questions correctly answered by the insured, 4 L. R. A. (N. S.) 607; L. R. A. 1915 A 273. Effect of falsity when due to misconstruction of facts by insurer's agent, 16 L. R. A. 38.

EVANS ET AL. v. SEEVERS.

[No. 9,154. Filed February 18, 1916. Rehearing denied May 12, 1916.]

APPEAL.—Dismissal.—Accepting Benefits of Judgment.—Where a judgment quieted title in favor of appellee subject to a lien for the support of appellant's codefendant and cancelled a deed from the codefendant to the appellant, in which the codefendant had reserved a life estate, an agreement for compensation to appellant by the appellee for the support of the codefendant, and the acceptance by appellant of payments under the agreement, came within the spirit of §671 Burns 1914, §632 R. S. 1881, providing that the party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon, and necessitated a dismissal of the appeal.

From Gibson Circuit Court; *A. P. Twineham*, Special Judge.

Action by Gussie Seevers, by his next friend William E. Williams, against Lula Fay Evans and another. From a judgment for plaintiff, the defendant Lula Fay Evans appeals. *Appeal dismissed.*

Union W. Youngblood, W. C. Mason and Elbert M. Swan, for appellant.

Lindsey & Bock, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor in a suit brought by him in the court below against appellants to quiet title to certain real estate and also to have set aside a deed to the same real estate made by the appellant Margaret Vincent to her coappellant Lula Fay Evans. Margaret Vincent did not originally assign error in this court. Later her guardian (appointed since the judgment below was rendered) filed a petition asking to assign error. Thereafter, and before such petition was acted on by this court, the guardian filed his written request asking to withdraw his petition and in his request expressed satisfaction with the judgment below, and a desire

not to involve the estate of his ward in the costs of an appeal. This request of the guardian was granted. Lula Fay Evans is therefore the only active appellant in this case and will hereinafter be referred to as appellant. Gussie Seevers, hereinafter referred to as appellee, is a minor and prosecuted this action by next friend. He is also under guardianship, the name of his guardian being William E. Williams. By the averments of his complaint, appellee showed that the land to which he sought to have his title quieted was charged with the maintenance and support of said Margaret Vincent, who is his grandmother, and that she, in her deed to appellant, who is also her grandchild, reserved to herself a life estate in said real estate.

Appellee has filed in this court a verified "answer in bar to assignment of errors and motion to dismiss appeal". It will be necessary to an understanding of such answer and motion to set out the judgment from which the appeal is taken, and an agreement between appellant and appellee's guardian entered into by them since the submission of this appeal to this court. The judgment is as follows: "It is * * * adjudged and decreed by the court that the plaintiff Gussie Seevers is the owner in fee simple of the following described real estate situate in Warrick County, State of Indiana, to wit: (setting out description of real estate). And that his title in and to said real estate is hereby quieted and forever set at rest as against the claim of Lula Fay Evans. * * * That the title of the plaintiff, Gussie Seevers, in and to said real estate, be quieted and forever set at rest as against the claim of the defendant Margaret Vincent, except so far as the same may be necessary to secure to said defendant Margaret Vincent provision for her reasonable support and

maintenance for and during her natural life.
* * * That the deed from the defendant Margaret Vincent to the defendant Lula Fay Evans, dated February 27, 1912, wherein the defendant Margaret Vincent undertook to convey to the defendant Lula Fay Evans said real estate herein described, be, and the same is hereby declared null and void and of no force and effect whatever.
* * * That the above described real estate be and same is hereby charged with the reasonable support and maintenance of the defendant Margaret Vincent for and during her natural life, and the same is hereby declared to be a lien and charge on said real estate to secure said support and maintenance. * * * That the plaintiff Gussie Seevers recover of and from the defendant Lula Fay Evans his costs herein laid out and expended.”
Said agreement is as follows: .

“Articles of Agreement entered into this 15th day of October, 1915, between William E. Williams, guardian of Gussie Seevers, party of the first part and Lula Fay Evans party of the second part, witnesseth: That whereas, on the 22d day of June, 1914, in a certain action then pending in the Gibson Circuit Court of Indiana, entitled ‘Gussie Seevers by his next friend, William E. Williams against Margaret Vincent and Lula Fay Evans,’ the Gibson Circuit Court of Indiana rendered judgment, by virtue of which the said Margaret Vincent was adjudged to be entitled to reasonable support and maintenance for and during her natural life from the proceeds of the real estate therein described, a copy of which judgment is attached thereto marked ‘Exhibit A’ and made a part hereof, and Whereas, William E. Williams is now, and has been continuously for more than three years last past, guardian of the said Gussie Seevers, and as such guardian has under his control the

management of the real estate described in said judgment; and whereas, the said Margaret Vincent named in said judgment is now more than eighty-five years of age and in feeble health and needs considerable care and attention and some clothing; and whereas, she is now, and has been for more than three years last past, living with the said Lula Fay Evans, her granddaughter; and whereas, the said Lula Fay Evans is willing to furnish to the said Margaret Vincent board and clothing and necessary attention at and for the price of \$5.50 per week, payable weekly and the said William E. Williams as guardian of the said Gussie Seevers believes that said \$5.50 per week is a reasonable charge for the services to be rendered; Now therefore the party of the first part agrees to pay to the party of the second part the sum of \$5.50 per week, payable each and every Saturday beginning October 23rd, 1915, to and including the last Saturday in March, 1916, and the said Lula Fay Evans agrees in consideration of the payment to her of said sum of money to furnish to the said Margaret Vincent, board and clothes and to give her whatever care and attention is necessary for the period of time above specified. It is expressly agreed and understood by the parties hereto that if the said Margaret Vincent becomes helpless and confined to her bed continuously for more tahn one week at a time under the care of a physician, that the party of the first part is to pay to the party of the second part in addition to the above amount a reasonable sum for the extra care and trouble to which the party of the second part may be put by reason of such sick and helpless condition of the said Margaret Vincent, the party of the first part reserving the right to have the said Margaret Vincent examined by a reputable physician in the event of a dispute arising between the parties hereto, as to the condi-

tion of the health of the said Margaret Vincent. In testimony whereof the parties have hereunto set their hands and seals this 15th day of October, 1915. William E. Williams, Guardian, Party of the first part, Lula Fay Evans, Party of the second part. Attest: Thos. W. Lindsey, Union W. Youngblood."

Appellee's verified answer in bar sets out the judgment and agreement, *supra*, and alleges acceptance and partial performance of the agreement by both appellant and appellee's guardian in that under and pursuant to such agreement such guardian paid and appellant accepted payment at the end of each week the weekly allowance for the support and maintenance of Margaret Vincent. Copies of appellant's respective receipts for such payments are filed with and made part of said answer. There are six of these receipts all of which are in substantially, if not identically the same words, except as to date. The first is as follows:

"Booneville, Ind., Oct. 23, 1915. Received of William E. Williams, Guardian of Gussie Seevers for the week ending today, the sum of Five and 50/100 (\$5.50) Dollars for care and support of Margaret Vincent, judgment defendant in a certain action wherein Gussie Seevers by his next friend William E. Williams, was plaintiff and Margaret Vincent and Lula Fay Evans were defendants, in which action judgment was rendered by the Gibson Circuit Court of Indiana on the 22nd day of June, 1914, and by virtue of which judgment said guardian and myself entered into a written contract on the 15th day of October, 1915, for the care and support of the said Margaret Vincent. Lula Fay Evans."

It is contended by appellee, in effect, that the facts set out in such answer show that appellant

has accepted and received benefits under the judgment appealed from; that she has acquiesced in such judgment, recognized its validity and estopped herself from further prosecuting her appeal, and hence that her appeal should be dismissed. To appellee's said answer in bar, appellant has filed her verified reply and motion to reject and strike appellee's answer in bar from the files, and to reverse the judgment below because of confessed error resulting from appellee's failure to file briefs on assignment of error as provided by the rules of the court. This reply and motion is too lengthy to set out in full. Its averments material to the question to be determined are, in brief, substantially as follows: Appellee's time for filing his brief herein on the assignment of errors expired about April 18, 1915, and he has never filed such briefs or obtained any extension of time for the filing thereof; that appellant's appeal herein is in good faith; that she has never intended to and has not in fact recognized the validity of the judgment from which the appeal is taken, but has always intended to deny its validity and prosecute her appeal to final judgment; that she never at any time demanded any money from appellee, Gussie Seevers, or from his guardian or next friend or from any one representing either of them; that on October 15, 1915, Thomas W. Lindsey appellee's attorney, met appellant at the law office of her attorney, U. W. Youngblood, and there proposed that she enter into a contract with appellee's guardian William E. Williams to care for, support and furnish clothing to the appellant Margaret Vincent; that this was the first intimation or suggestion that she had of such an agreement; that said Lindsey represented to her that they desired to contract directly with her to care for and support said

Margaret instead of furnishing funds for that purpose to the guardian of said Margaret in order to save the costs and expense of double guardianship; that she finally consented to enter into said contract; that she has never received from appellee or any one representing him anything except for services rendered in caring for and boarding and clothing said Margaret, and has never received any benefit flowing or inuring to her under and by reason of said judgment; that the receipts filed with appellee's answer in bar were prepared either by appellee's attorney or by his guardian who is also an attorney and she executed the same without her attorney seeing them, then believing and now believing that by accepting the money and so receipting therefor she in no way recognized the validity of said judgment; that by so doing she had no intention of recognizing the validity thereof; that the deed under which appellant claimed the land in dispute and made part of such reply reserved to Margaret Vincent a life estate in said real estate and that said Margaret's right to support and maintenance has never been involved in this litigation, but is recognized in the judgment appealed from and also in the deed under which appellant claims title to the real estate involved. The reply closes with eight separate reasons why the answer in bar should be rejected and stricken from the files, which we need not set out. To this reply appellee's attorney, Thomas W. Lindsey, filed a lengthy affidavit, the substance of the material part thereof being to the following effect, viz., for the last three or four years Margaret Vincent has made her home with appellant and since July 1, 1914, has been under guardianship. Such guardian after his appointment employed appellant to provide for, care and nurse said

Margaret. Sometime about October, 1915, the funds in the hands of such guardian were exhausted or nearly so and appellant was so advised. Union W. Youngblood, who is appellant's attorney in this appeal, was consulted, and through him said guardian filed a petition in the Warrick Circuit Court wherein he set up the judgment obtained in the Gibson Circuit Court which is herein appealed from, and alleged that on account thereof the said Margaret had a lien for her support and maintenance on the land described in said petition (being the same land described in said judgment). Said petitioner also alleged that such guardian was in need of funds with which to provide for the support and maintenance of said Margaret and asked an order to sell such real estate, or so much thereof as was necessary to raise the sum of \$500 for such purpose. Upon the filing of such petition, affiant, as attorney for appellee conferred with said Youngblood, said guardian's attorney, (and also appellant's attorney herein) and suggested that no suit was necessary to require appellee to comply with said judgment as appellee was satisfied therewith and willing to furnish the care, support, etc., as therein provided, and it was then agreed between affiant, as appellee's attorney and said Youngblood, attorney for said guardian, that affiant should meet appellant at the office of her attorney, said Youngblood, on October 15, 1915, for the purpose of arriving at an agreement between appellant and appellee's guardian. Pursuant to this arrangement, affiant and appellant met at said office where they, in the presence of said Union W. Youngblood and his partner Nat. L. Youngblood, verbally agreed upon a contract for the support and maintenance of said Margaret, and by agreement of said attorneys, affiant then retired from said office and

prepared in duplicate such contract and again returned to said office therewith, when said Union W. Youngblood read such contract aloud to appellant and advised appellant that it was all right, after which the appellant and appellee's guardian signed the same, and said contract was then witnessed by said Union W. Youngblood and affiant. The contract there prepared and signed is the same as the copy of the contract made part of appellee's answer in bar herein. After such contract was signed, viz., either at the October or December term of court following, said attorneys Youngblood and Youngblood, representing the guardian of said Margaret, dismissed said petition to sell said real estate. Affiant does not file a copy of said petition with his affidavit because the same could not be found. Affiant never at any time undertook to deceive, defraud or mislead appellant, and never at any time talked with her except in the presence and hearing of her attorneys.

It will be observed that appellant does not question the execution of the agreement or the receipts relied on by appellee, nor does she deny the several payments by appellee's guardian to her, or the acceptance by her, of the weekly allowance provided for in said agreement. The fact that said receipts were procured from appellant in the absence of her attorneys is not of controlling influence. Said agreement was talked over with her in the office of her attorneys and had their approval before it was signed by her, and the receipts show no more than a payment and receipt of payment of the amount provided for in such agreement, according to the terms thereof. The undisputed facts show that no advantage was taken of appellant, or fraud practiced on her in procuring the execution of the agreement or re-

ceipts. The question which we must determine, therefore, is whether the appellant, by entering into the agreement and accepting the payments therein provided for the support and maintenance of her grandmother, thereby accepted the benefits of the judgment appealed from, or recognized the validity of such judgment and thereby waived her right to prosecute her appeal further. This question is controlled by §671 Burns 1914, §632 R. S. 1881, and the decisions construing the same. Said section provides in part as follows: "The party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon."

The provisions of the judgment here involved do not extend to appellant, herself, any benefits, and for this reason it would seem that appellant could not accept benefits thereunder within the meaning of the statute, *supra*, if technically construed. Such conclusion, however, has no support if such statute be interpreted according to its spirit and the reason for its enactment and in the light of the decisions construing it. The theory of appellee in his complaint and throughout the trial of the case was that he is entitled to the real estate involved, subject to a lien thereon for the support and maintenance of his grandmother, and such was the effect of the finding and judgment of the trial court. Appellant's deed to the real estate likewise reserved a life estate therein in favor of the grandmother. Upon these facts appellant bases a contention that the right of the grandmother to her care and support out of the real estate was conceded and is not involved in the appeal, and hence that the contract entered into between appellant and appellee's guardian was separate, distinct and apart from the issues involved in the appeal. We can not agree

with this contention. There is a material difference between the effect of a deed which reserves to the grantor a life estate in the real estate conveyed and a judgment which charges the same real estate with the support and maintenance of such grantor and declares a lien on such real estate for such support and maintenance. In the latter case the real estate may be sold, if necessary, to discharge such lien. Indeed, it appears in the instant case that the agreement relied on by appellee was made because of the proceedings filed in court to sell the real estate here involved to satisfy the lien declared thereon for the maintenance and support of appellant's coappellant. It follows from what we have indicated as disclosed by the undisputed facts shown by the agreement, receipts and affidavits, *supra*, that appellant and her attorneys knew when she entered into the agreement with appellee's guardian that Margaret Vincent and her property were primarily liable for her care and support and that appellee's liability therefor, if it existed, resulted from the fact that the judgment from which appellant had appealed and which was made part of the agreement, provided that the land in controversy should be charged with the care and support of said Margaret, and that appellee's title was quieted thereto subject to a lien for such support and maintenance. It also follows, we think, that appellant must be charged with knowing that by agreeing to accept and afterwards accepting from appellee's guardian pay for such care and support, she recognized the validity of such judgment in so far as it fixed upon appellee the duty of supporting his grandmother, as a condition to the perfecting of his title to the real estate, and she knew and recognized that appellee's guardian was paying for such support

because he was by the terms of such judgment required to do so in order to free his ward's land from the lien of such support and maintenance and to prevent the sale of said real estate or some part thereof to satisfy such lien.

Under the authorities, this explicit recognition of the validity of said judgment would alone be sufficient to operate as a waiver by appellant of her right to prosecute her appeal further, because such recognition of the validity of the judgment is wholly inconsistent with her effort to have it declared invalid. 3 C. J. 669; *Williams v. Richards* (1899), 152 Ind. 528, 53 N. E. 765, and cases cited; *Ewing v. Ewing* (1903), 161 Ind. 484, 69 N. E. 156; *Beard v. Hosier* (1915), 58 Ind. App. 14, 18, 19, 107 N. E. 558, and cases cited; *Thompson v. Midland, etc., Cement Co.* (1906), 37 Ind. App. 459, 77 N. E. 299; *Sonntag v. Klee* (1897), 148 Ind. 536, 47 N. E. 962. Ewbank's Manual (2d ed.) §§112, 112a, 227 and cases cited in notes. There are other reasons why the showing here made brings the case at least within the spirit of the statute, *supra*, and the decided cases. While such judgment does not extend to appellant herself any benefits, it does extend to her coappellant the benefit of a lien for her maintenance and support on the land involved therein.

As before stated, appellant's coappellant, Margaret Vincent, is not prosecuting this appeal, but if she were and after appealing had accepted her support and maintenance from appellee under an agreement like, or similar to, that entered into by appellant, we apprehend that it would not be disputed that she had thereby accepted the benefits of the judgment appealed from and hence estopped herself from further prosecuting her appeal. So too, if it had been shown that appellant had in-

duced or procured her coappellant to accept her support and maintenance from appellee under and pursuant to the terms of said judgment, appellant would be estopped thereby from further prosecuting her appeal. Can it be said that appellant has taken herself outside of the spirit and scope of the statute, *supra*, simply because she herself procured from appellee for her coappellant and indirectly for herself, all the benefits which such judgment gives her coappellant? It seems to us that the question furnishes its own answer.

Under the undisputed facts here presented appellant is in no position to claim either that she has not received any benefit under the judgment, or that she has not recognized its validity. Furthermore, upon the strength of appellant's recognition of the validity of such judgment, appellee has paid her for the maintenance and support of her coappellant and thus, to this extent, performed the obligation imposed on him by such judgment. Appellant has therefore taken from the appellee and caused him to do that which otherwise he would not have given or done and that which she had no right to take or cause him to do, except on the condition that she intended to abandon her appeal, and allow the judgment which she recognized as valid to stand; and hence she has estopped herself from further prosecuting the appeal. For the reasons indicated, we are of the opinion that the instant case has in appellee's favor practically all the elements contemplated by the statute, *supra*, as interpreted and construed by the decisions of both courts of our State. See cases cited, *supra*; 3 C. J. 679-686; Ewbank's Manual (2d ed.) §§112, 112a, 227 and cases cited in notes. The appeal is therefore dismissed.

NOTE.—Reported in 111 N. E. 438.

INDIANA QUARRIES COMPANY v. SMALLWOOD.

[No. 9,034. Filed May 16, 1916.]

1. MASTER AND SERVANT.—*Injury to Servant.—Complaint.—Sufficiency.*—The allegation in a complaint for injuries to plaintiff, while operating a pump for defendant, that plaintiff while in the line of his duty and while in the employ of appellant attempted to remove the top of an oil cup for the purpose of refilling same with oil, and that while so doing and while in the exercise of due care and caution plaintiff's hand was caught in unguarded cogs, etc., together with other allegations with reference to plaintiff's employment to operate the pump, and that in the operation of such pump it was necessary to remove the top of the oil cup from time to time to refill such cup, sufficiently showed that plaintiff was acting in the line of his duty when injured. pp. 34, 35.
2. PLEADING.—*Complaint.—Test of Sufficiency.*—The sufficiency of a complaint is not to be determined by a single isolated allegation, but it must be tested in the light of all the averments that are well pleaded. p. 35.
3. MASTER AND SERVANT.—*Guarding Dangerous Machinery.—Factory Inspector.*—The complaint in an action under §8029 Burns 1914, Acts 1899 p. 231, for injuries to a servant by contact with unguarded cogs, was not insufficient for failure to allege that the chief factory inspector had ordered a guard to be placed over such cogs, since that portion of the statute having to do with the inspector relates only to belt shifters or any other safe devices for the purpose of throwing on or off belts and pulleys. p. 35.
4. APPEAL.—*Review.—Evidence.—Sufficiency.*—Where there was some evidence to support the verdict, it could not be disturbed on the ground of insufficient evidence, although the evidence was conflicting in some respects. p. 36.

From Lawrence Circuit Court; *Oren O. Swails*, Judge.

Action by Enoch Smallwood against the Indiana Quarries Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Underwood & Underwood, for appellant.

Albert J. Fields, for appellee.

IBACH, C. J.—This is an action by appellee to recover damages for personal injuries alleged to have been caused by appellant's negligence. The

trial resulted in a judgment for appellee for \$2,500. The errors relied on for reversal are the overruling of the demurrer to the complaint, and the overruling of the motion for a new trial.

Appellant owns and operates a stone quarry and stone mill in Lawrence County, Indiana. On April 29, 1913, and for some time prior, it conveyed the water which is used in the operation of its mill from a near-by creek, by means of a large pump, which appellee was employed to, and did, operate. The complaint avers also that the pump was propelled by means of a belt from an electric motor to a pulley on said pump operating cogwheels meshing with each other. Two of the cogs operating the pump meshed together at the front side of the pump near which point of meshing was an oil cup for the purpose of feeding oil to the wearing parts of the pump. The oil cup was within two or three inches of the point where the cogs meshed together, and in the operation of the pump it was necessary to remove the top of the oil cup from time to time and refill said cup. The negligence charged is the failure to perform a duty required by statute to guard the cogs and it is charged that the injury occurred on account of the failure to guard such portions of the machinery, and while appellee was attempting to unscrew the top of the oil cup his hand was caught in the unguarded cogs and three fingers were severed.

Although appellant in effect concedes that

1. the complaint proceeds upon the theory of an alleged violation of §8029 Burns 1914, Acts 1899 p. 231, of what is generally known as the "Factory Act", it is contended that the allegation "while in the line of his duty and while in the employ of appellant, and about the hour of 11 o'clock p. m., attempted to remove the top of said

oil cup for the purpose of refilling the same with oil and while so doing and while in the exercises of due care and caution to avoid injury his hand was caught in said unguarded and unprotected cogs," etc., is insufficient for an allegation that it was his duty to oil the cogs or to work in close proximity thereto

The sufficiency of the complaint is not to be determined from a single isolated allegation, but it must be tested in the light of all the averments that are well pleaded, and when the quoted averment is considered in connection with the further allegations with reference to his em-

2. ployment to operate the pump, and that "in the operation of said pump it was necessary to remove the top of said oil cup from time to time and refill said cup", they sufficiently show that appellee was operating the pump when

1. oiling it, and was therefore acting in the line of his duty when injured. *Domestic Block Coal Co. v. DeArme*y (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *I. F. Force Handle Co. v. Hisey* (1913), 52 Ind. App. 235, 96 N. E. 643.

Neither is the pleading insufficient because

3. there is no allegation that the chief inspector
• had ordered a guard to be placed over the cogwheels or between the cogwheels and the oil cup. The statute is not subject to this construction. The portion of the act which has to do with the inspector relates only to belt shifters or any other safe devices for the purpose of throwing on or off belts and pulleys. *United States Cement Co. v. Cooper* (1909), 172 Ind. 599, 88 N. E. 69; *Indiana Mfg. Co. v. Wells* (1903), 31 Ind. App. 460, 68 N. E. 319. Any other conclusion, it seems to us, would result in nullifying the entire statute. We do not believe that the legislature could have

intended to relieve the master using such dangerous machinery as is described in the act, §8029 Burns 1914, *supra*, without necessary guards, until the chief factory inspector had made an inspection of all the factories in the State which came within its provisions and had ordered all dangerous machinery guarded.

Appellant insists also that the verdict is not sustained by the evidence; that the evidence fails to show appellee was an employe of appellant

4. at the time of the injury; and, if it did show that he was an employe, then it shows that he was guilty of contributory negligence. No good purpose can come from setting forth all the evidence produced at the trial. It is sufficient to say that there is positive evidence to the effect that appellant was employed to run the "Salt Creek pump" of appellant, and that his employment covered either day or night work as he should be assigned. Appellee also testifies that it was his duty to operate the pump when he went on duty until he was relieved. There is evidence also tending to show that the pump was operated during twenty-four hours each day and night by appellee and Russell Smallwood, and that they arranged their working hours between themselves, so that each worked twelve hours, and on the night of the injury the order to appellee to run the pump came to him through the usual and ordinary course from those in charge of the works, and that he proceeded to operate the pump in compliance with that order. There is also evidence to show that appellee when injured was operating the pump in the usual way; that it was necessary to keep the pump well oiled and in so doing he followed the method employed by other employes while engaged in the same work; that it was necessary to use waste

Miller v. Gates—62 Ind. App. 37.

or a glove to remove the top of the oil cup. All the witnesses agree that a guard could have been placed over the cogs, or between them and the oil cup, without interfering with the proper operation of the machinery, and that the failure to guard the cogs was the proximate cause of the injury. While there is some conflict as to some portions of this evidence, its weight was for the jury. We conclude that there was some evidence to sustain the material averments of the complaint, and as there is no evidence which tends to show appellee guilty of contributory negligence, the motion for a new trial was properly overruled. Judgment affirmed.

NOTE.—Reported in 112 N. E. 549. Duty of master to servant, 75 Am. St. 591. Employee's right of action for employer's violation of statutory duty as to guards about dangerous machinery, 9 L. R. A. (N. S.) 381.

MILLER v. GATES ET AL.

[No. 9,181. Filed May 17, 1916.]

1. NUISANCE.—*Action to Enjoin.*—*Complaint.*—*Sufficiency.*—In view of §343a Burns 1914, Acts 1913 p. 850, providing that where the sufficiency of a pleading is called in question all recitals, statements and conclusions shall be treated as allegations of fact, and §291 Burns 1914, §289 R. S. 1881, providing that whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property so as to essentially interfere with the comfortable enjoyment of life or property, is an actionable nuisance, and other provisions for the enjoining or abating of nuisances, a complaint alleging that plaintiff was the owner of a dwelling house; that defendant, the owner of an adjoining lot, operated a sawmill thereon, thereby creating a nuisance; that quantities of logs were being continuously hauled to the sawmill; that mud was splashed on plaintiff's residence; that vulgar language was used in the hearing of plaintiff's family; that employes of the sawmill habitually gazed into plaintiff's residence, using vulgar and disgusting language; that smoke, soot and odors were wafted from the sawmill into plaintiff's residence; that noises lessened plaintiff's enjoyment of his residence; that plaintiff and his family were prevented from peaceably enjoying their home; and that the value of the property was greatly depreciated, was sufficient to state a cause of action for injunctive relief. p. 38.

2. **APPEAL.**—*Review.*—*Moot Question.*—Where an injunction was sought, but pending an appeal from a judgment for defendant the acts complained of had ceased, the question of whether the injunction should be granted became a moot question, not to be further considered. p. 41.
3. **NUISANCE.**—*Action for Injunction and Damages.*—*Appeal.*—*Moot Question.*—*Disposition of Cause.*—Where plaintiff sued to enjoin the operation of a sawmill as constituting a nuisance and also sought the recovery of damages on account of injury to his property, the fact that pending an appeal from the judgment for defendant the acts sought to be enjoined had ceased, thus rendering the question of whether an injunction should be granted a moot one, did not necessitate a dismissal of the appeal or preclude plaintiff from a consideration of his right to damages, in view of the statutory provisions abolishing distinctions between actions at law and suits in equity, and authorizing the granting of legal or equitable relief, or both, in one and the same suit. p. 42.

From Montgomery Circuit Court; *Jere West*, Judge.

Action by Clay Augustus Miller against Omer Gates and another. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Robert W. Marks and *Ira Clouser*, for appellant.
Clyde H. Jones, for appellee.

CALDWELL, J.—Judgment was rendered against appellant for failure to plead over, on the sustaining of a demurrer to his complaint. Error

1. is assigned on the ruling on the demurrer.

The following facts appear from the complaint: At the time of the grievances complained of and for a number of years prior thereto, appellant was the owner of a dwelling property situate in a populous residence district in the town of Ladoga, in which he was living with his family. Appellee Gates was the owner of an adjoining lot on which he and his coappellee Davis, in October, 1912, located and proceeded and continued to operate an ordinary swamp sawmill, and thereby created and continued a nuisance; that they were

continuously hauling to said lot large quantities of sawlogs, and that in unloading them they splashed mud on appellant's house and the windows therein; that the men employed by them in hauling the logs and in operating the mill continually used coarse and vulgar language in the hearing of appellant's family; that such men while engaged as aforesaid habitually gazed into appellant's residence, and while so doing used vulgar and disgusting language; that soft coal is used in the operation of the mill, thereby creating a dense, black smoke, which together with dust, soot, dirt and odors, drifts therefrom into appellant's residence, and that the contents thereof are continually covered therewith; that appellant has spent a great deal of time and money in an effort to keep his property hygienic and inhabitable, but is unable to do so for reasons aforesaid; that the odor from appellee's premises is noxious and at times sickening to appellant and his family and injurious to their health; that the constant noise emitted from the mill is injuring the hearing and health of appellant's family; that the constant operation of the mill in such close proximity to appellant's home is dangerous to the health of appellant and his family, and that they are prevented thereby from peaceably enjoying the quiet and comfort of their home; that prior to the grievances complained of, appellant's property was of the value of \$3,500, but by reason of such grievances and the constant danger from fire caused by the proximity of the mill, said property has become uninhabitable and has depreciated in value \$1,500, and the rental value of said property has been greatly lessened; that there are other locations conveniently near to which, with small expense, appellee can remove the mill, and there operate it without inconven-

ience to appellant; that it is appellees' purpose to continue to operate the mill as aforesaid, and that thereby appellant is suffering and will suffer a continuing injury which cannot be compensated in damages. The prayer asks for an injunction, and for damages already sustained.

Appellees urge the insufficiency of the complaint as a basis for injunctive relief, on the ground that the material elements of what might otherwise be a cause of action, if sufficiently pleaded, appear only by way of recital or conclusion. As the action was commenced in September, 1913, the sufficiency of the complaint must be determined in the light of §343a Burns 1914, Acts 1913 p. 850, to the effect that in all pleadings, where the sufficiency of the same is called in question, all recitals therein and all statements contained in any participial expression shall be held to be allegations of fact, whenever necessary to the sufficiency thereof, and that except as against a motion to make more specific, all conclusions stated therein shall be held to be the allegations of all facts required to sustain such conclusions when the same are necessary to the sufficiency of the pleading. Proceeding to determine the sufficiency of the complaint, it is provided by statute that whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property so as to essentially interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. §291 Burns 1914, §289 R. S. 1881. There are other provisions that where a proper case is made, the nuisance may be enjoined or abated, and damages recovered therefor, and that the action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance.

§§292, 293 Burns 1914, §§290, 291 R. S. 1881. It does not now concern us whether, had appellant been put to proof, he would have been able to make such a case as would have entitled him to injunctive relief. We are dealing here with a question of pleading, rather than evidence. Construing recitals and conclusions contained in the complaint, as we are required to do by the terms of §343a Burns 1914, *supra*, it is our judgment that the complaint states a cause of action for injunctive relief, and that the court erred in sustaining a demurrer thereto. See the following, some of which indicate also the measure of proof necessary to sustain such a cause of action: *Foor v. Edwards* (1910), 45 Ind. App. 259, 90 N. E. 785; *Haggart v. Stehlin* (1893), 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577; *Kaufman v. Stein* (1894), 138 Ind. 49, 37 N. E. 333, 46 Am. St. 368; *Owen v. Phillips* (1881), 73 Ind. 284; *Radican v. Buckley* (1894), 138 Ind. 582, 38 N. E. 53; *Reichert v. Geers* (1884), 98 Ind. 73, 49 Am. Rep. 736; *Clendenin v. Pickett* (1912), 51 Ind. App. 283, 99 N. E. 530; *Rogers v. John Weeks Lumber Co.* (1903), 117 Wis. 5, 93 N. W. 821; 29 Cyc 1167, 1173, 1184, 1185; *Bohn v. Port Jervis Gas Light Co.* (1890), 9 L. R. A. 711, note.

Having reached such conclusion, it becomes necessary for us to consider another phase of the case: It appears from certain affidavits and

2. counter affidavits filed in this court *pro* and *con* on appellee's motion to dismiss the appeal, that, after the perfecting of the appeal, Gates sold the property on which the sawmill was located to Mitchell, and that, under a right reserved, he afterwards removed from the premises the mill and its appurtenances; that Mitchell having thereafter sold the lot to appellant's wife, Gates, by direction of Mitchell conveyed the lot to appel-

lant's wife, and that the lot is now in the possession of appellant as agent for his wife, and that it is being used for purposes other than the operation of a sawmill. On such facts, appellees moved the dismissal of the appeal. When such motion was presented to this court, action thereon was postponed until final hearing. We are now required to dispose of it. By the occurrence of the events set forth in such affidavits, the injunctive phases of this appeal become moot, and should not, therefore, be further considered by this court or the trial court. *Princeton Coal, etc., Co. v. Gilmore* (1908), 170 Ind. 366, 83 N. E. 500; *Dunn v. State* (1904), 163 Ind. 317, 71 N. E. 890; *Crawfordsville Trust Co. v. Ramsey* (1913), 55 Ind. App. 40, 100 N. E. 1049, 102 N. E. 282.

The complaint in its main features proceeds to the end that equitable relief may be granted, and it is, therefore, an appeal to equitable

3. jurisdiction. There are, however, allegations to the effect that appellant's property has been damaged, and as incidental relief he prayed judgment in damages. The latter feature of the complaint being merely an incident, the question presents itself whether the matter of damages also becomes moot by reason of such fate overtaking the main question involved. By reason of the fact that an award of damages in an equitable action is an incident to the establishing of equitable rights, or to the granting of equitable relief, it is held in a number of jurisdictions, not uniformly, however, that where in a suit in equity the equitable relief sought is denied or for any reason fails, the court may not in such action award complainant damages although prayed for; that as to damages suffered by reason of the alleged wrong against which equitable relief is sought there is a remedy at law.

Bannse v. Northern Pac. R. Co. (1913), 205 Fed. 328; *Peals Co. v. Bradley* (1915), 166 App. Div. 267, 151 N. Y. Sup. 602; *Tennessee, etc., R. Co. v. Paint Rock, etc., Transp. Co.* (1913), 128 Tenn. 277, 160 S. W. 522; *McMillan v. Wylie* (1903), 45 Fla. 487, 33 South. 993; *Bromberg v. Eugenotto Constr. Co.* (1908), 158 Ala. 323, 48 South. 60, 19 L. R. A. (N. S.) 1175. As to the rule in certain code states, see 16 Cyc 113 and note citing cases, and closing with language to the effect that where the complaint states facts sufficient to ground a recovery at law, such recovery may be had although the equity fails.

In 1881, the legislature of this State, by an enactment preserving the spirit of a prior act, provided that there should be no distinction in pleading and practice between actions at law and suits in equity, and that there should be but one form of action, denominated a civil action for the enforcement or protection of private rights and the redress of private wrongs. §249 R. S. 1881, §249 Burns 1908. That statute was enacted to the end that a complaining party might be awarded such relief as the facts stated in his complaint, if proven, entitles him to. 1 Work's Practice §177. Said statute was amended in 1911, by the addition thereto of the following: "All courts which are vested with jurisdiction both in law and equity may, to the full extent of their respective jurisdictions, administer legal and equitable remedies, in favor of either party in one and the same suit, so that the legal and equitable rights of the parties may be enforced and protected in one action." §249 Burns 1914, Acts 1911 p. 415. In harmony with the spirit of the code as revealed by the foregoing statute and amendment, it is held that in an action prosecuted primarily for an injunc-

tion, where the complaint although insufficient to that end, states facts sufficient to entitle the plaintiff to a judgment in damages, and that relief also is prayed for, it will withstand a demurrer for want of facts. See the following: *Xenia Real Estate Co. v. Macey* (1897), 147 Ind. 568, 47 N. E. 147; *Sahm v. State, ex rel.* (1909), 172 Ind. 237, 88 N. E. 257; *Owens v. Lewis* (1874), 46 Ind. 488, 15 Am. Rep. 295; *Bonnell v. Allen* (1876), 53 Ind. 130; *Decker v. Yohe* (1913), 179 Ind. 243, 100 N. E. 756; *Knickerbocker Ice Co. v. Surprise* (1913), 53 Ind. App. 286, 97 N. E. 357, 99 N. E. 58; *Culbertson v. Munson* (1886), 104 Ind. 451, 4 N. E. 57. It follows that if, on a trial of such an action, the evidence fails to establish plaintiff's right to equitable relief, but does entitle him to damages, judgment should be rendered accordingly. §249 Burns 1908, *supra*. *Sahm v. State, ex rel., supra*. The complaint here not only states a cause of action for equitable relief, but also, under the liberal rules of pleading now in vogue, is sufficient as a foundation for a judgment in damages, based upon a permanent injury to appellant's real estate. For this additional reason, the demurrer should have been overruled. The complaint falls short of stating a cause of action on the theory of depreciation in rental value or value of the use of such real estate. As to whether on a trial, if had, the evidence would disclose such a permanent injury or any injury to the real estate does not now concern us. See cases collected in 3 Burns, Indiana Digest 635.

If follows that, under the facts contained in said affidavits, only the equitable question involved rather than the entire case has become moot. The motion to dismiss is therefore overruled, and the judgment reversed, with instructions to overrule the demurrer to the complaint, and for

further proceedings not inconsistent with this opinion, and with permission to reform the pleadings if desired.

NOTE.—Reported in 112 N. E. 538. Business and machinery that may be enjoined as nuisances, 51 Am. Rep. 467.

PAXTON-ECKMAN CHEMICAL COMPANY v. MUNDELL.

[No. 9,053. Filed May 17, 1916.]

1. SALES.—*Fraud on Buyer.—Remedies.—Right to Rescind.*—Where one has been fraudulently induced to enter into a contract for the purchase of property, he may retain the property and bring an action for the damages caused by such fraudulent representations, or he may rescind the contract. p. 50.
2. SALES.—*Fraud.—Action.—Liability.—Complaint.*—Where it was clear from the allegations of the complaint that plaintiff proceeded upon the theory that he was damaged by the fraudulent conduct of defendant in inducing him to purchase certain merchandise, defendant's liability could not be measured by the terms of the contract of sale, although a copy was made a part of the complaint. p. 50.
3. CONTRACTS.—*Fraud.—Remedies.*—It is the rule, subject to certain exceptions, that one who has been induced by fraud to execute a contract and is damaged thereby may make such fraudulent conduct the basis of an action, or he may set the same up as a defense to an action on the contract. pp. 50, 51.
4. FRAUD.—*Contracts.—Validity.*—Where a person designedly or knowingly causes a false impression to be entertained by another, and by reason thereof such other person is induced to enter into a contract to his detriment, and which he otherwise would not have entered into, such contract is so impressed with fraud as not to be sanctioned by the courts and enforced against the party defrauded. p. 51.
5. FRAUD.—*Remedies.—Effect of Contract.*—Where one has been induced by fraud to enter into a contract, provisions in the contract that all covenants, warranties and agreements are embodied therein and that no other agreement, stipulation or warranty will be recognized unless approved or accepted in writing, do not limit or restrict the party defrauded to the contract nor prohibit him from prosecuting an action for the damages he has sustained by reason thereof. p. 52.
6. FRAUD.—*Expressions of Opinion.*—While mere expressions of opinion concerning the value, utility, future use and the like of property do not as a general rule constitute actionable fraud, statements by a seller that experiments had been made with

Paxton-Eckman Chem. Co. v. Mundell—62 Ind. App. 45.

stock powders, and that it had been ascertained that they would prevent hog cholera, were statements as to existing facts and included matters with which the buyer was unacquainted, and, being false and relied upon by the buyer, constituted actionable fraud. p. 52.

7. APPEAL.—*Questions Presented.*—*Motion for New Trial.*—Alleged error in overruling a motion for new trial presents no question where it appears that the motion was not filed in time. p. 55.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by Joseph O. Mundell against the Paxton-Eckman Chemical Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

A. H. Murdock and *Strawn & Robinson*, for appellant.

Kent & Ryan, for appellee.

MORAN, J.—Appellee purchased of appellant a large quantity of stock powders, and in the purchase thereof he alleges in his complaint that he was damaged by reason of fraud and deceit being practiced upon him by appellant. Upon issues being joined by an answer in general denial addressed to the complaint and a trial had thereon, a verdict was returned in favor of appellee in the sum of \$1,750. From a judgment on the verdict, appellant has appealed, presenting for consideration of the court the sufficiency of the complaint to withstand a demurrer for the want of facts.

The principal averments of the complaint are: That appellant corporation through its servants falsely and fraudulently represented to appellee that it manufactured a commercial compound which, when fed to hogs, would prevent them from contracting cholera, and when properly fed would cause hogs to fatten more easily than if not so fed; that it had made extensive research in order to produce a medicine that would prevent such

disease and kindred diseases to which hogs were subject, and in the compounding of the P-E stock powders its desire had been accomplished; that, in order to induce appellee to purchase a larger amount thereof, it was represented to him that such stock powders would find a ready market among farmers and hog raisers, and appellee believed the representations so fraudulently made, and purchased 4,000 pounds in consideration of \$400; that, in order to induce appellee to make an additional purchase, an experienced salesman called upon him and, together with appellee, visited several farmers and hog raisers in Clinton county, Indiana, and the salesman represented to such farmers and hog raisers that the powders he desired to sell had been compounded after years of labor and experimenting upon sick hogs and, by reason of such extensive experimenting, it was found that a powder had been finally compounded that would prevent hogs from contracting cholera and kindred diseases and, when properly fed, it would cause them to fatten more easily; that such representations were falsely and fraudulently made and by reason thereof, in less than three days, such salesman sold some 800 pounds of powders, and by such false and fraudulent representations appellee was led to believe that the powders could be easily retailed to farmers and hog raisers at a profit of five cents per pound; that appellee believed by reason of the false and fraudulent representations that the powders were so compounded that they would prevent hog cholera; that immediately after the sale of the powder by the salesman to the farmers and hog raisers aforesaid, an officer of appellant company called upon appellee and represented to him that the powder had been thoroughly tested, and he knew that it would do all that was claimed for it; that

appellee being without knowledge as to the merits of the same relied upon the representations made, which were false and known to be such by the salesman and officers of appellant company, and through their representations appellee was induced to make an additional purchase of 40,000 pounds of such powder in consideration of \$3,200; that the experiment claimed to have been made by appellant's salesman and officers as to the powder was not made and the same was not so compounded as to prevent cholera and kindred diseases of hogs, all of which appellant's salesman and officers well knew. At the time of the purchase of the powders by appellee, the following writing was entered into, which is made a part of the complaint:

“Memorandum of Agreement. This memorandum of agreement made and entered into this 27th day of October, 1911, by and between Paxton-Eckman Chemical Co. (Incorporated) of South Omaha, Nebr., of the first part and J. O. Mundell of Frankfort, Indiana, the second part, Witnesseth: That the first party has this day sold to the second party 40,000 pounds of the P-E Stock Powders, at the rate of 8 cents per pound, to be delivered F. O. B. South Omaha, Nebraska, and shipped by freight, for which the said second party has this day paid for in manner and form as follows, towit: Given his promissory note due nine months from date, secured by second mortgage. In consideration of the purchase of said powders under this contract the said first party the exclusive right to sell the P-E Stock Powders in Boone County, second party to have one of our Ford autos. The said second party agrees to diligently and energetically canvass and push the sale of said goods so furnished in the territory allotted to him. The said first party hereby reserves the right at any time, when said second party

does not sell said goods in satisfactory quantities, to cancel said contract and to enter the territory and sell out the stock of the said second party. The said first party is to have fifty per cent of the profits while assisting said second party. It is expressly agreed that all the covenants, warranties and agreements of the parties hereto are set forth in the contract, and that no other agreement, stipulation or warranty, verbal or otherwise, will be recognized unless approved or accepted in writing by the party of the first part. It is hereby made a condition precedent to the operation and non-continuation of this contract that the said second party shall handle said first party's produce exclusively. Any infringement of the above shall constitute a forfeiture of this contract. Signed in duplicate on the day above named. Paxton-Eckman Chemical Co. E. M. Eckman, J. O. Mundell. Witness J. C. Crouse, Approved."

The infirmities, which it is urged the complaint is subject to, may be subdivided as follows: (1) That the entire negotiations in regard to the sale and purchase of the stock powders were reduced to writing, and that appellee had an equal opportunity with appellant to know the contents of the writing before signing the same; that appellant's liability is measured by the written contract and appellee's remedy is confined thereto, and the contract containing none of the representations upon which appellee relies, the complaint is not sufficient; (2) that the law does not hold a party responsible for the expression of an opinion as to the merits of an article offered for sale, although the same be false, where no special confidence is reposed, and that the negotiations between appellant and appellee are brought within this rule by the allegations of the complaint.

It is a familiar principle of law that where a party has been fraudulently induced to enter into a contract for the purchase of property, he

1. may retain the property and bring an action for the damages caused by such fraudulent representations, or he may rescind the contract. 20 Cyc 87; *Ohlwine v. Pfaffman* (1913), 52 Ind. App. 357, 100 N. E. 777; *Nyswander v. Lowman* (1890), 124 Ind. 584, 24 N. E. 355. Although a copy of the contract is made a part of the

2. complaint, the action is based on fraud, hence appellant's first objection to the complaint that appellant's liability is measured by the contract and appellee's remedy is confined thereto is not well taken. It is clear from the allegations of the complaint that appellee proceeded upon the theory that he was damaged by the fraudulent conduct of appellant in inducing him to purchase the stock powders in the manner set forth in the complaint. Where a party is induced by fraud to execute a contract and is damaged there-

3. by he may make the fraudulent conduct the basis of an action, or he may set the same up as a defense to an action on the contract. This rule, however, is subject to exceptions and "one of them occurs when the representations, though false, relate to the legal effect of the instrument sued on. Every person is presumed to know the contents of the agreement which he signs, and has, therefore, no right to rely on the statements of the other party as to its legal effect." *Clem v. Newcastle, etc., R. Co.* (1857), 9 Ind. 488; *Gipe v. Pittsburgh, etc., R. Co.* (1908), 41 Ind. App. 156, 82 N. E. 471. But with the exceptions we are not here concerned. The allegations of the complaint disclose that the representations on the part of the servants of appellant as to the

merits of the article sold are so related to the execution of the contract that, had it not been for such representations and a belief that they were true, appellee would not have executed the contract. Where a person designedly or know-

4. ingly causes a false impression to be entertained by another and, by reason thereof, such other person is induced to enter into a contract to his detriment, and which he otherwise would not have entered into, such a contract is so impressed with fraud as not to be sanctioned by the courts and enforced against the party defrauded. *Ray v. Baker* (1905), 165 Ind. 74, 74 N. E. 619; *Leeds v. Boyer* (1877), 59 Ind. 289; *Howe Mach. Co. v. Brown* (1881), 78 Ind. 209; *Kemery v. Zeigler* (1912), 176 Ind. 660, 96 N. E. 950.

Appellant's objection to the complaint that the parties are confined to the contract seems to be well answered in the case of *Stanhope v. Swafford* (1890), 80 Iowa 45, in which the court said: "It will be observed that the action is to recover for false representations inducing plaintiff to

3. make the trade. Now, if it be assumed that all the terms of the contract are embodied in the writing, and the false representations are not expressed therein, plaintiff may recover thereon, for the reason that the action is not upon the contract, but for false representations—a cause of action other and independent of the contract. If one should be enveigled or induced by false representations to enter into a contract of a sale of property, he could maintain his action on the false representations; and would not be required to sue on the contract of sale in order to recover his damages therefor." This principle finds support in numerous authorities. *Hines v. Driver* (1880), 72 Ind. 125; *Tyler v. Anderson* (1886), 106

Paxton-Eckman Chem. Co. v. Mundell—62 Ind. App. 45.

Ind. 185, 6. N. E. 600; *Hart v. Haynes* (1915), 150 Pac. (Kan.) 530; *Rambo v. Patterson* (1903), 133 Mich. 655, 95 N. W. 722; *Edward Thompson Co. v. Schroeder* (1915), 154 N. W. (Minn.) 792; 20 Cyc 89; *Outcall Advertising Co. v. Young Hardware Co.* (1913), 161 S. W. (Ark.) 142; *J. I. Case Threshing Mach. Co. v. Webb* (1916), 181 S. W. (Tex. Civ. App.) 853; *Monell v. Colden* (1816), 13 Johns. 395, 7 Am. Dec. 390; *N. C. Anile & Bro. v. Sexton* (1891), 137 Ill. 410, 27 N. E. 691; *Hurlbert v. T. D. Kellog Lumber, etc., Co.* (1902), 115 Wis. 225, 91 N. W. 673; *Foss v. Newbury* (1891), 20 Ore. 257, 25 Pac. 669; 2 Elliot, Contracts §1651; *Ward v. Wiman* (1837), 17 Wend. (N. Y.) 192.

The action for fraud impeaches the validity of the contract, as a whole, therefore, the provisions in the contract that all the "covenants, war-

5. ranties and agreements of the parties" are embodied in the contract, and "that no other agreement, stipulation or warranty, verbal or otherwise will be recognized unless approved or accepted in writing" by appellant, do not limit or restrict appellee to the contract nor prohibit him from prosecuting an action in fraud for the damages he has sustained by reason thereof. *Hart v. Haynes, supra*; *Edward Thompson Co. v. Schroeder, supra*; *J. I. Case Threshing Mach. Co. v. Webb, supra*.

This brings us to the second objection urged to the complaint, viz., Were the representations alleged to have been made material or were they mere expressions of opinion? Mere expressions of opinion concerning the value, utility,

6. future use and the like of property do not as a general rule constitute actionable fraud, as representations to be fraudulent in law must be made concerning a material fact upon which the

party to whom the representations are made has a right to, and does, rely to his injury. However, a party professing to have superior knowledge, who falsely represents a thing to exist and makes representations for the purpose of procuring an undue advantage over a person with whom he is contracting, and who is without such knowledge, is guilty of fraud. The complaint in the case at bar, among other things, alleges that appellant, through its servants, represented that it had made extensive research and had experimented upon diseased hogs and, by reason of such extensive research and experiment, had finally compounded a drug, the ingredient of which was to be found in the powders it desired to sell appellee, that would prevent hogs from contracting hog cholera; that the representations thus made were false and known to be so by appellant's servant, who made them, and were made for the purpose of inducing appellee to purchase the powders; that appellee would not have purchased the same had it not been for such fraudulent representations; that appellee was without knowledge of the merits of the powders, which fact appellant's servants well knew. These allegations go to existing facts. That appellant had by research and experiment compounded a drug that was found to prevent hog cholera was a material representation, and included a field in which, as the pleading disclosed, appellee was unskilled; and he did not have an equal opportunity with appellant to know the value and merits of the article sold.

Where a jeweler made false statements to an unskilled purchaser as to the merits of an article, which none but experts would be supposed to understand, Campbell, J., said: "Where a purchaser, without negligence, has been induced by the arts

of a cheating seller to rely upon the material statements which are knowingly false * * * it can make no difference in what respect he has been deceived, if the deceit was material and relied on." *Picard v. McCormick* (1862), 11 Mich. 68. In the case of *Conlan v. Roemer* (1889), 52 N. J. L. 53, persons skilled in sinking water wells agreed with the owner of the premises to sink a well to the rock and then into the rock to such a depth as to get a plentiful supply of water, they to receive \$3.50 per foot therefor, and that in all probability this depth would not exceed twenty-five feet. They sank a shaft to the depth of 276 feet before finding the requisite supply of water. At the time of entering into the contract they knew by reason of their skill and experience that water could not be obtained at a depth of twenty-five feet. In this connection the court said: "So, if the plaintiffs, who were experts in their business, stated that water would probably be reached at the depth of twenty-five feet, when, in truth, their opinion, founded on actual previous experience, was, that it would be necessary to drill to the depth of more than two hundred feet, they asserted as a fact what they knew to be false."

The parties did not deal at arms length; the facilities for ascertaining the truth were not equal; the subject-matter of the negotiations and purchase was of such a nature and character that appellee being without information as to the merits thereof had a right to rely upon the representations made by appellant's servants, who professed to have the technical knowledge warranting the representations made. Appellee had a right to rely upon the same, which he did, to his injury. The complaint states a cause of action. *Huffstetter v. Buzett* (1869), 32 Ind. 293; *Coulter v. Clark* (1903), 160 Ind. 311, 66 N. E. 739; *Peffley v. Noland* (1881),

80 Ind. 164. The error assigned upon the action of the court in overruling appellant's motion for a new trial presents no question for consideration, 7. for the reason that the motion for a new trial was not filed within the time prescribed by the statute. §587 Burns 1914, Acts 1913 p. 848. Judgment affirmed.

NOTE.—Reported in 112 N. E. 546. Buyer's risk, see 75 Am. St. 77.

AULT v. CLARK ET AL.

[No. 9,351. Filed May 17, 1916.]

1. APPEAL.—*Presenting Questions for Review.—Peremptory Instruction.*—The giving of a peremptory instruction is not the subject of an independent assignment of error, but is properly assigned as ground for a new trial. p. 58.
2. TRIAL.—*Peremptory Instruction.*—The right to direct a verdict for defendant can only be upheld where the evidence is clearly insufficient to establish one or more facts essential to plaintiff's cause of action. p. 59.
3. DEEDS.—*Construction.—Description.—Judicial Sales.—Evidence of Extrinsic Facts.—Admissibility.*—While it is the office of a description in a deed of conveyance to furnish the means of identification rather than to identify the land, and the same is to be liberally construed to effectuate the intent of the parties, and extraneous or parol evidence is competent to apply the terms of a deed to the subject-matter, so as to explain vague or conflicting descriptions and ascertain the intention of the parties, such rules of construction have no application to a conveyance made pursuant to a judicial decree, and may not be resorted to in any case for the purpose of thwarting the intent of the parties. pp. 60, 61.
4. DEEDS.—*Construction.—Evidence of Extrinsic Facts.—Admissibility.*—Where the description in a deed is not ambiguous, and no issue is tendered directly attacking such descriptions, or making a reformation or correction material, extraneous evidence affecting same is not proper. p. 61.
5. DEEDS.—*Unambiguous Writings.—Construction.*—A deed or other writing that is unambiguous is to be so interpreted as to carry into effect the intention of the parties expressed by the language employed. p. 61.
6. DEEDS.—*Description.—Judicial Sales.—Evidence of Extrinsic Facts.*—Where plaintiff in an action to quiet title and for possession had an administrator's deed issued pursuant to a judicial sale for

an undivided two-thirds of the land described, and a deed from the widow of decedent conveying the undivided one-third, and no issue was tendered seeking the reformation of the widow's deed, evidence to show that the land described in the complaint was the only land owned by decedent or his widow and was the land intended to be conveyed, was inadmissible, the descriptions in the deeds being complete and certain. p. 62.

7. JUDGMENTS.—*Order of Sale.—Collateral Attack.*—Where plaintiff sought to quiet title to land conveyed by an administrator's sale, defendant's claim that the title described in the deed does not cover the land described in the complaint is not a collateral attack on the court's order of sale pursuant to which such administrator's deed was made. p. 63.
8. APPEAL.—*Review.—Peremptory Instruction.—Reasons for Giving.*—Where the giving of a peremptory instruction was proper, the reasons of the court for its giving, set forth therein, were immaterial and did not affect it. p. 64.

From Lake Circuit Court; *W. C. McMahan*, Judge.

Action by John A. Ault against Edith Clark and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Otto J. Bruce and *H. Vincent Youkey*, for appellant.

Schuyler C. Dwyer, *J. Will Belshaw* and *Bomberger, Curtis, Starr & Peters*, for appellees.

HOTTEL, J.—Appellees have filed a motion to dismiss this appeal. Our examination of this motion and the record convinces us that the case may be affirmed on its merits and that a consideration of such motion is not important or necessary.

The complaint herein is in two paragraphs. In the first paragraph, which is in the usual short form to quiet title, appellant seeks to quiet title to the following real estate in Lake county, Indiana, viz.: "A part of the east half of the southwest quarter of section twenty-three (23), township thirty-three (33) north, range nine (9) west of the second principal meridian and more particularly

described as commencing at a point in the center of the county road (now street) one hundred ninety-eight (198) feet west of the northwest corner of lot 1 in Clark's addition to the town of Lowell in said county and state; thence south eighty-nine and three-fourths feet ($89\frac{3}{4}$); thence west to the creek; thence northerly along the creek to the center of the said county road (now street); thence east along the center of the said county road (now street) to the place of beginning." The second paragraph seeks to recover possession of the same real estate, and alleges that defendants (appellees) now hold possession thereof without right, to appellant's damage in the sum of \$100. There was a trial by jury and at the close of the evidence the court peremptorily instructed the jury as follows: "Gentlemen of the jury, this has resolved itself into a law question. The court is required to construe a description in a deed which described the land conveyed as being eleven acres off the south end of the east half of the southwest quarter of the section. The court construes that as a matter of law to mean eleven acres extending across the entire south side of it, or a strip of land twenty-two rods wide, extending entirely across the south end of the eighty. *The evidence in this case discloses and shows that no part of the land described in this complaint falls within that eleven acres described in that deed. That being true the plaintiff has shown no title in himself. Therefore your verdict must be for the defendants.*" (Our italics.) Pursuant to this instruction, a verdict was returned in appellees' favor. A motion for new trial filed by appellant was overruled, and judgment was rendered on the verdict. Proper exceptions were saved by appellant to the action of the court in giving said instruction, and to the ruling on his motion for new trial, and

each of said rulings is assigned as error in this court and relied on for reversal. The action of the

trial court in giving such instruction is not
1. ground for independent assignment of error, but is properly presented by being assigned as one of the grounds of the motion for a new trial. *White v. State, ex rel.* (1915), 183 Ind. 649, 109 N. E. 905, and cases cited. While other grounds of such motion challenge the verdict as not being sustained by sufficient evidence and as being contrary to law, a disposition of the question presented by the action of the trial court in giving said instruction will in effect dispose of the appeal.

To show title to the land described in his complaint, appellant offered in evidence a patent from the United States and numerous consecutive conveyances through which, as claimed by appellant, title to said real estate was finally conveyed to Nathaniel H. Foote on August 21, 1862. Appellant then offered certain record evidence showing the death of Nathaniel H. Foote, the appointment of his widow as administratrix of his estate, the filing of a petition by her to sell certain described lands of decedent to pay his debts, an order authorizing the sale of such lands, the sale thereof, the report of sale, the approval thereof and the deed made thereunder. Among other lands, set out by such administratrix in her petition as lands owned by decedent and sought to be sold to pay his debts, was the following: "The undivided two-thirds of eleven acres of land off of the south part of the southeast quarter of the southwest quarter of section (23) twenty-three, town (33) thirty-three north, of range (9) nine west." This same description appears throughout such proceedings, including the report of sale and the deed made by such administratrix. Appellant then offered the

quitclaim deed of the widow of said decedent for her undivided one-third of the same lands sold by her as administratrix, and in her deed appears the same description above indicated. The deeds of said administratrix and widow of Nathaniel H. Foote to Nichols, dated May 2, and May 5, 1864, respectively, constituted a necessary link in the chain of title upon which appellant relies as proof of his title to the lands described in his complaint, and it is conceded by both him and appellees that it was to these deeds that the trial court referred in its peremptory instruction, *supra*. It is also, in effect conceded by appellant that the description in said deeds does not in fact cover any part of the lands described in his complaint, but appellant asserts, in effect, that by verbal testimony he has identified the lands, viz., that he showed that the description contained in the deed to Foote, in fact, described 11 16/100 acres and that such tract was the only tract of land in section 23, township 33 north, range 9 west, ever owned by Foote. Upon this evidence it is insisted by appellant that he has shown a complete record title, or at least made a *prima facie* case, which entitled him to have the question of his title submitted to the jury. Of

course, if there was any proper evidence from
2. which the jury might have reasonably inferred that appellant was the owner of the land described in his complaint, the instruction was improper, as the right to direct a verdict in such a case "can only be upheld where it can be said that the evidence was clearly insufficient to establish one or more facts essential to plaintiff's cause of action." *West v. National Casualty Co.* (1916), 61 Ind. App. 479, 112 N. E. 115, and cases cited; *Barker v. Chicago, etc., R. Co.* (1912), 51 Ind. App. 669, 671, 99 N. E. 135; *Sullivan v. Indianapolis, etc., Traction*

Co. (1914), 55 Ind. App. 407, 414, 103 N. E. 860.

In support of his contention, appellant relies on certain rules applicable in proper cases to the construction and interpretation of deeds,

3. which may be stated as follows, and are supported by the authorities cited after each.

It is not the office of a description in a deed of conveyance to identify the land intended to be conveyed, but to furnish the means of identification. *Rucker v. Steelman* (1881), 73 Ind. 396; *Scheible v. Slagle* (1883), 89 Ind. 323; *Hannon v. Hilliard* (1885), 101 Ind. 310; *Trentman v. Neff* (1890), 124 Ind. 503, 24 N. E. 895; *Collins v. Dressler* (1892), 133 Ind. 290, 32 N. E. 883; *Edens v. Miller* (1897), 147 Ind. 208, 46 N. E. 526; *Elsea v. Adkins* (1905), 164 Ind. 580, 74 N. E. 242, 108 Am. St. 320; *Warner v. Marshall* (1906), 166 Ind. 88, 107, 75 N. E. 582. The rule as to construction of the description of premises in a deed is very liberal to the end that "the intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated." *Key v. Ostrander* (1867), 29 Ind. 1, 6. See, also, *Hannon v. Hilliard*, *supra*; *Roehl v. Haumesser* (1888), 114 Ind. 311, 15 N. E. 345; *Peck v. Mallams* (1853), 10 N. Y. 509, 532. Extraneous and parol evidence is competent to apply the terms of a deed to the subject-matter. *Warner v. Marshall*, *supra*, and cases cited. Where two conflicting or contradictory descriptions of the same tract or parcel of real estate appear in a deed, or where the description is vague and obscure, or uncertain and indefinite, resort may be had to extrinsic facts or oral evidence to aid in ascertaining, if possible, the intent of the parties. *Hornet v. Dumbleck* (1907), 39 Ind. App. 482, 78 N. E. 691.

There can be no doubt about the correctness

of these rules or the necessity for their application in a proper case, but, as indicated by the language in which they are stated, they are applied only when it becomes necessary to look beyond the deed to ascertain the intent of the parties expressed therein as to the land intended to be conveyed by such deed. In other words, they are resorted to for the purpose of explaining and effectuating the intent of the parties as expressed in their deed, but never to contradict or thwart such intent, and where the description in the deed is not ambiguous but is certain and complete there is no occasion

4. to resort to extrinsic evidence to ascertain the intent of the parties as to the land intended to be conveyed and, in the absence of an issue tendered directly attacking such description, making a correction or reformation thereof proper and material, resort to extraneous evidence is not proper. *Tewksbury v. Howard* (1894), 138 Ind. 103, 37 N. E. 355; *McFarland v. Stansifer* (1905), 36 Ind. App. 486, 76 N. E. 124. It is a fundamental rule of construction that where a writing is unambiguous "it shall be so interpreted as

5. to carry into effect the intention of the parties expressed by the language employed." *Kann v. Brooks* (1913), 54 Ind. App. 625, 628, 101 N. E. 513. See, also, *Blythe v. Gibbons* (1895), 141 Ind. 332, 344, 35 N. E. 557, and cases cited. In this connection it should also be stated that

3. the rules, *supra*, which appellant seeks to invoke have no application to a conveyance made pursuant to judicial order or decree. *Rogers v. Abbott* (1871), 37 Ind. 138, 140, 141; *Bowen v. Wickersham* (1890), 124 Ind. 404, 24 N. E. 983, 19 Am. St. 106; *Lewis v. Owen* (1878), 64 Ind. 446, 447; *Dale v. Travelers Ins. Co.* (1883), 89 Ind. 473; *Struble v. Neighbert* (1872), 41 Ind.

344; *Cunningham v. McCollum* (1884), 98 Ind. 38; *Runnels v. Kaylor* (1884), 95 Ind. 503.

It is conceded and, indeed, contended by both appellant and appellees that the sale by the administratrix of the Foote estate was a

6. judicial sale. See *Pierce v. Vansell* (1905), 35 Ind. App. 525, 74 N. E. 554. It follows that, under the authorities, *supra*, appellant's title, in so far as it comes through such deed, must be determined by the deed itself. Such deed does not describe the land or any part thereof described in appellant's complaint, and hence furnishes no proof of appellant's title to such land. Appellant makes no distinction between the deeds of the administratrix of the Foote estate for the undivided two-thirds of the land therein described and the deed made by the widow for her one-third of the same land, but, assuming that an issue might have been tendered which would have permitted a reformation of the widow's deed, no such issue was tendered. On this question, see *Roehl v. Haumesser*, *supra*, and cases cited. This is not an attempt by a direct proceeding to have a description in a deed corrected or reformed. On the contrary, we are dealing with a case in which appellant, without any averments of mistake in description in his complaint, is seeking to prove and quiet title to, and obtain possession of, a tract of land specifically and certainly described in such complaint, by a deed or deeds which with equal certainty and completeness describe another and entirely different tract of land. *Langohr v. Smith* (1882), 81 Ind. 495; *Bowen v. Wickersham*, *supra*. Our last statement is predicated on the assumption that the trial court in its peremptory instruction properly interpreted the description contained in said two deeds as meaning eleven acres extending

entirely across the south end of the 80-acre tract, viz., a strip of land twenty-two rods wide, extending entirely across the south end of the eighty. As supporting the court's conclusion, see *Hornet v. Dumbeck*, *supra*; *Cobb v. Taylor* (1893), 133 Ind. 605, 32 N. E. 822, 33 N. E. 615; *Maquire v. Bissell* (1889), 119 Ind. 345, 21 N. E. 326; *Mitchell v. Brawley* (1895), 140 Ind. 216, 39 N. E. 497; *Winslow v. Cooper* (1882), 104 Ill. 235; *Tierney v. Brown* (1888), 65 Miss. 563, 5 South. 104, 7 Am. St. 679. The deeds referred to in the peremptory instruction were, we think, properly construed by the trial court but, if not, the description therein was so indefinite and uncertain that the land attempted to be described could not be located by a surveyor. In either event, under the issues tendered by appellant's complaint, the authorities, *supra*, justify the action of the trial court in giving said peremptory instruction. *Mahan v. Reeve* (1842), 6 Blackf. 215; *Struble v. Neighbert*, *supra*; *Cunningham v. McCollum*, *supra*; *Lewis v. Owen*, *supra*; *Hammond v. Stoy* (1882), 85 Ind. 457; *Freeman*, Execution §281; 2 Devlin, Deeds (3d ed.) §§1010-1019; *Tierney v. Brown*, *supra*; *Macy v. Wood* (1912), 49 Ind. App. 469, 97 N. E. 553.

Appellant contends that the effect of such a holding results in a collateral attack upon the judgment and decree of the court which

7. authorized the administratrix to sell the

Footo land, and cites, *Pepper v. Zahnsinger* (1884), 94 Ind. 88, and *Meikel v. Borders* (1891), 129 Ind. 529, 29 N. E. 29, to the effect that such a sale can not be collaterally attacked where there was jurisdiction of the person and the subject-matter. There is no doubt about the correctness of the legal proposition for which appellant contends. He errs in assuming that the validity of the judicial

sale is attacked by the conclusion. The conclusion is predicated on the validity of such sale but asserts that a tract of land different from that described in appellant's complaint was sold, and hence that a conveyance of the tract so sold furnishes no proof of ownership in the purchasers at such sale of the land claimed by appellant.

It is also contended by appellant that the peremptory instruction "was inaccurate and incorrect in point of fact." The question suggested is not material, if our conclusion,

8. *supra*, on the main proposition is correct.

If the evidence warranted the court in peremptorily instructing the jury to return a verdict for appellees, it was not material whether it gave a correct reason for so doing. Indeed it was not necessary that it give any reason therefor.

We find no error in the record and the judgment below is therefore affirmed.

NOTE.—Reported in 112 N. E. 843. General descriptions of property in deeds, 66 Am. St. 59. Immunity from collateral attack of an order of a probate court for the sale of a decedent's real estate, 3 Ann. Cas. 234.

HARRIS ET AL. v. THE INTERNATIONAL STEEL AND IRON CONSTRUCTION COMPANY.

[No. 9,079. Filed May 19, 1916.]

1. **APPEAL.**—*Review.*—*Harmless Error.*—*Ruling on Demurrer.*—Where it appeared that the facts found and conclusions of law stated rested upon a good paragraph of complaint, the action of the trial court in overruling the demurrer to another paragraph was harmless even if erroneous. p. 66.
2. **PLEADING.**—*Complaint.*—*Written Instruments.*—*Action on Contractor's Bond.*—In an action on the bond of a contractor for the repair of a school house, a paragraph of complaint, embracing a copy of the bond as an exhibit and alleging facts to show that plaintiff had furnished material and was within the class to be protected by the bond, was not insufficient for failure to include a copy of the con-

Harris v. International, etc., Constr. Co.—62 Ind. App. 64.

tract referred to in the bond and to secure the performance of which the bond was executed, since the contract was not the foundation of plaintiff's action. p. 66.

3. **APPEAL.**—*Review.*—*Harmless Error.*—*Demurrer to Answer.*—The sustaining of a demurrer to a third paragraph of answer, which was merely an argumentative denial, was harmless in view of the record showing an answer in general denial. p. 72.

From Clay Circuit Court; *John M. Rawley*, Judge.

Action by The International Steel and Iron Construction Company against Curtis Harris and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Cary L. Harrel and Walker & Blankenbaker, for appellants.

Webster V. Moffett, Samuel M. McGregor and Orion B. Harris, for appellee

McNUTT, J.—This was an action by appellee against appellants to recover upon a contractor's bond executed by appellants, as sureties, and James A. Farabee and John L. Berry, as principals, to Lewis School Township, of Clay county, Indiana, for the repair of a certain schoolhouse belonging to said school township, said claim of appellee being for certain material alleged to have been furnished to, and used by, the contractors.

The errors assigned question the action of the court in overruling the separate and several demurrers of appellants to the first and second paragraphs of complaint, and also the correctness of the court's first conclusion of law upon the special finding of facts. Appellants also assign jointly error of the court in sustaining the demurrer to the third paragraph of their answer. The objections urged against each paragraph of the complaint are: (1) That said paragraphs should have exhibited a

copy of the contract between the contractors and the school township; (2) that the first paragraph fails to show that appellee, within thirty days after furnishing material, filed with the trustee of the township a claim for the building material sued for as provided by the act of March 4, 1911. Acts 1911 p. 437, §§5901a, 5901b, 5901c Burns 1914.

Appellee contends that when the facts found and the conclusions of law stated show they sustain and rest upon a good paragraph of complaint

1. and the judgment is rendered thereon, the error of the court in overruling a demurrer to another paragraph is harmless, because the record affirmatively shows that the judgment rests upon the good, and not the insufficient paragraph. Appellee's contention in this regard is well supported by authority. *Goodwine v. Cadwallader* (1902), 158 Ind. 202, 61 N. E. 939; *Smith v. Wells Mfg. Co.* (1897), 148 Ind. 333, 46 N. E. 1000. It follows, therefore, that if the facts found and conclusions of law stated rest upon the second paragraph of complaint, the sufficiency of the first paragraph becomes immaterial.

The second paragraph of complaint alleges, in substance, that James A. Farabee and John L. Berry, on July 12, 1911, entered into a

2. written contract with said school township for the repair of a schoolhouse in said township, and that in said contract it was specified and agreed by the contractors that they would furnish and pay for all labor and materials necessary for said repairs according to the contract and the plans and specifications; that at the time of the execution of the contract, and as part consideration therefor, the contractors executed to the township their bond, with appellants as sureties thereon, which was accepted by the township

and was for the benefit of the township and any and all persons who might have or acquire a right to recover any moneys thereon, and to secure the faithful performance of the contract; that the bond further provided that the contractors should pay all persons for material and labor that should become entitled to compensation for material and labor furnished to the contractors, including reasonable attorneys' fees, and a copy of the bond is made a part of the complaint by exhibit. The paragraph further alleges that the repair of the building according to the contract made necessary the use of the materials furnished by appellee, and that they were sold to the contractors for the purpose, and were used in the building by the contractors, and a bill of particulars of such materials was filed with and made a part of the complaint by exhibit; that after the materials were so purchased and used by the contractors, and within less than thirty days from the delivery and use of same, and within less than thirty days from the time of the performance of the work and labor as shown by exhibit "B", and within less than thirty days after the work was performed and material furnished, appellee filed a claim with the trustee of the township for his work, labor and material and notified the trustee of the fact that the claim was due and unpaid; that the trustee and the contractors had not paid the claim and that the claim was due and wholly unpaid, with the usual allegations as to attorneys' fees and a prayer for judgment against all defendants upon the bond. The bond sued upon, except the closing part and signatures is as follows:

"Know all men by these presents: That we, J. A. Farabee and J. L. Berry as principals, of the town of Jasonville, county of Greene,

State of Indiana, are held and firmly bound unto Lewis Township by its trustee Elihu Puckett of the County of Clay, State of Indiana, as well as to all persons who may become entitled to liens, compensation for labor, or material under the within contract in the sum of seven thousand and three hundred fifty-six (\$7,356.00) dollars lawful money of the United States of America to be paid to the said township of Lewis by its trustee Elihu Puckett, and to said parties who may be entitled to liens, compensation for labor or material, their executors, administrators or assigns for which payment well and truly to be made we bind ourselves, one and each of our heirs, executors, and administrators jointly and severally firmly by these presents. Sealed with our seals, dated this the 12th day of July, 1911. The condition of this obligation is such, that if the above bounden J. A. Farabee and J. L. Berry, their executors, administrators or assigns, in all things stand to and abide by and well and truly keep and perform the covenants in within contract entered into by and between the J. A. Farabee and J. L. Berry and the said Lewis Township by its trustee Elihu Puckett, dated on the 12th day of July, 1911, for the construction of the work or works on the lot mentioned in the within contract and shall duly and promptly pay and discharge all indebtedness that may be incurred by the said J. A. Farabee and J. L. Berry in carrying out the said contract and complete the same free of all mechanics liens and shall truly perform the covenants in said contract and in the within instrument contained on their part to be kept and performed at the time and in the manner and form therein specified as well as of all costs, including attorneys fees in enforcing the payment and collection of any and all indebtedness incurred by said J. A. Farabee and J. L. Berry or any subcontractor or agent in carry-

Harris v. International, etc., Constr. Co.—62 Ind. App. 64.

ing out the said contract then the above obligation shall be void, else to remain in full force and virtue. This bond is made for the use and benefit of all persons who may become entitled to liens under the said contract according to the provisions of law in such cases made and provided and may be sued upon by them as if executed to them in proper person * * *."

Section 368 Burns 1914, §362 R. S. 1881, provides that: "When any pleading is founded on a written instrument or on account the original, or a copy thereof, must be filed with the pleading." Judge Hogate in his work, 1 Hogate, Pleading and Practice, §412, in discussing this statute, says: "It is not every written instrument that may become available as evidence, or otherwise, that is such within the meaning of the statute. Pleadings often incorporate into the pleadings, as exhibits that which does not constitute the foundation of the action; and it becomes frequently a question as to what written instrument is or is not the foundation of an action. An examination of all the decided cases will not enable one to deduce a rule that will be invariable. Perhaps as near a rule as can be stated is that where the party to be charged has signed the instrument that is declared on, in such case the instrument or a copy must be filed as an exhibit."

Unless the contract in question can be said to be the foundation of appellee's complaint, it was not necessary to exhibit it or a copy thereof. Instruments which are merely to be used as evidence do not generally fall within the statute. 31 Cyc 556. Appellants rely upon the case of *Potts v. Hartman* (1885), 101 Ind. 359, to support their contention that the contract should have been made a part of

the complaint by exhibit. In that case Mrs. Potts contracted with McClure for the erection for her of a dwelling house, to be completed according to certain specifications. At the same time McClure executed a bond to Mrs. Potts, with Hartman as surety, conditioned that he would construct and complete the dwelling house within the time and in the manner specified, and deliver the same to her free from any and all liens in favor of laborers or materialmen. Mrs. Potts afterwards requested certain additions. The building was not completed within the time prescribed; disagreements arose between the parties concerning payments for labor and materials furnished for the building, and Mrs. Potts and McClure, on a later date, entered into an additional or supplemental contract. Later Mrs. Potts commenced action against McClure and Hartman on the bond, alleging failure of McClure in several specified respects to complete the building according to the terms of the original contract. Hartman answered separately and, among other things, set up the execution of the additional or supplemental contract entered into by Mrs. Potts and McClure, alleging that the same was executed without his knowledge or consent. A demurrer to this paragraph of answer was overruled. The court in discussing this demurrer said: "The plaintiff, by her demurrer to the eighth paragraph of Hartman's answer, admitted that the additional, or supplemental, contract, set out in that paragraph, had been entered into between her and McClure. The necessary inference from that admission was that the complaint had not declared upon the entire contract existing between her and the McClures, and was, for that reason, essentially defective. When the complaint is thus essentially defective, it is well settled that the

plaintiff can not be heard to complain that a demurrer to an answer to it has been erroneously overruled. In such a case the plaintiff can not be regarded as having, in any event, been substantially injured by the ruling upon the answer." The case is the only one cited by appellant and it does not support their contention.

In the case of *Federal Life Ins. Co. v. Kerr* (1910), 173 Ind. 613, 617, 89 N. E. 398, 91 N. E. 230, the Supreme Court in discussing this question said: "The sufficiency of the complaint is vigorously challenged, on the ground that the transfer and the so-called reinsurance contract are so referred to in the agreement denominated the new policy as to become a part of it, to the extent that it must be made an exhibit of the complaint under our code, requiring written instruments, or copies thereof, upon which 'any pleading is founded', to be filed with the pleading. There are two distinct lines of cases in this State involved in this contention. One line holds that where one instrument refers to another which is necessary to its construction, or defines the conditions of rights claimed under it, or depends for its validity upon conditions expressed in another instrument, said instruments, when made the basis of a pleading, must be set out by copy or in the original. (Citing authorities.) Another line of cases is that presented under building contracts, building and loan association notes, and contracts of insurance, under which it is held that collateral instruments referred to in the instrument pleaded, or as inducements to contracts or agreements, which, though referring to other instruments, are complete in themselves, need not be copied, filed or exhibited. Of such are applications for insurance, specifications for buildings and machinery, and the like."

Appellee had no right of action on the contract, and it could not be the foundation of an action by materialmen. The bond, which is the foundation of appellee's second paragraph of complaint, was properly made an exhibit. It identifies the contract by date, parties and general subject-matter, and contains the following provision: "And shall duly and promptly pay and discharge all indebtedness that may be incurred by said J. A. Farabee and J. L. Berry (contractors) in carrying out the said contract." The second paragraph of complaint sets out the contract in substance, which was all that was necessary, and the court did not err in overruling the demurrer thereto. This is the only ground urged by appellants for sustaining their demurrer to said paragraph.

The special finding follows the facts alleged in the second paragraph of complaint, and our ruling on said paragraph requires us to hold that the court did not err in its first conclusion of law, which was to the effect that appellee was entitled to recover of the bondsmen jointly and severally the sum of \$249.28. *Ross v. Van Natta* (1905), 164 Ind. 557, 74 N. E. 10.

Appellant's joint assignment of error calls in question the action of the court in sustaining the demurrer to the third paragraph of answer.

3. It is urged by appellant that this paragraph alleges a failure by appellee to file a claim with the trustee within thirty days from the time of furnishing material and for that reason constituted a good defense to the complaint. The second paragraph of complaint alleges the filing of appellee's claim with the township trustee within thirty days from the time of furnishing the materials. The third paragraph of answer was merely an argumentative denial of said second

paragraph of complaint, and, as the first paragraph of answer was a general denial, it was not error to sustain a demurrer to said third paragraph. The record shows affirmatively that the finding and judgment rest upon the second paragraph of complaint, and error, if any, in sustaining the demurrer to the third paragraph of answer, as an answer to the first paragraph of complaint, was harmless. *Phoenix Ins. Co. v. Jacobs* (1899), 23 Ind. App. 509, 55 N. E. 778; *Goodwine v. Cadwallader*, *supra*; *Smith v. Wells Mfg. Co.*, *supra*.

If it were necessary to file notice of claim with the trustee in a case of the character here under consideration, which we do not decide, the second paragraph of complaint and the finding of facts made by the court show that the statute (§5901b Burns 1914, *supra*), was complied with in that respect.

The conclusion of law complained of was clearly right on the special finding of the court. Judgment affirmed.

NOTE.—Reported in 112 N. E. 532.

BOYER v. BOYER ET AL.

[No. 9,001. Filed March 15, 1916. Rehearing denied May 19, 1916.]

1. DESCENT AND DISTRIBUTION.—*Advancements.—Presumptions.*—Courts generally look with favor on an equal distribution of an estate cast upon heirs, and when it is disclosed that an heir received from the ancestor money or property during the lifetime of the ancestor, there is a presumption that the same was an advancement.
p. 78.
2. DESCENT AND DISTRIBUTION.—*Rights of Heirs.—Renunciation.*—A contract between father and son, whereby the latter agrees in consideration of the transfer of certain property to him at that time to relinquish all claim as heir to the property of which the father might die seized, is founded on a valid consideration, and, in the

Boyer v. Boyer—62 Ind. App. 73.

absence of fraud, is binding on the son, though the amount received by him was not equal to his full proportionate share of the estate. p. 78.

From Benton Circuit Court; *Burton B. Berry*, Judge.

Action by Mahlon R. Boyer against Simon R. Boyer and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Fraser & Isham, for appellant.

Thompson & McAdams, for appellees.

MORAN, J.—In the early part of the year of 1907, Simon H. Boyer, a widower of the advanced age of seventy years, was the owner of a large amount of property, consisting principally of real estate, a major portion of which he distributed among his four sons. At the time of making the distribution to his son Mahlon R. Boyer, he exacted of him a writing, which in its nature amounts to a quitclaim and release of any further interest in any estate that his father might be the owner of at the time of his death. On January 14, 1913, Simon H. Boyer departed this life intestate, leaving surviving his four sons, appellant and appellees; but no other children, nor the descendants of any child. At the time of his death, he he was the owner in fee simple of forty acres of real estate in Benton county, Indiana, the title to which is here in controversy. The litigation is waged around the writing entered into between appellant and his father aforesaid. It is appellant's position that, irrespective of the writing, he inherited under the law an undivided one-fourth interest in the tract of real estate owned by his father at the date of his death. On the part of appellees, it is contended that the writing is binding upon appellant, and that upon the death of

their father they became the owners of the entire tract of real estate as tenants in common by the law of descent. To the end that the question might be adjudicated, appellant became the moving party, but later upon the filing of a second paragraph of cross-complaint by appellees, which embodied the writing entered into between appellant and his father and alleged the ownership of the real estate in fee simple and that they were entitled to have the title quieted as against him, appellant dismissed his complaint and appellees their first paragraph of cross-complaint, leaving in the record the second paragraph of cross-complaint and two affirmative paragraphs of answer.

Tersely stated, the first paragraph of answer alleges that there was no consideration for the execution of the writing heretofore mentioned; that the same was void and of no effect in so far as it sought to estop appellant from claiming an interest in the real estate of which his father died seized; that it only served as evidence of an advancement, as each of appellees received a like amount of property about the time the writing was entered into; and that if the real estate left by appellant's father at the time of his death should all be awarded appellees, appellant would be deprived of sharing equally with his brothers in the bounty of his deceased father. The second paragraph pleads all the facts as to the circumstances under which the writing made a part of the second paragraph of the cross-complaint was entered into, the legal effect of which, however, does not differ from that of the first paragraph of answer. Appellees' demurrer was sustained to each of said paragraphs of answer, and appellant elected to stand on the ruling on the demurrer to the second paragraph of cross-complaint and the answers to the cross-complaint.

Judgment was rendered in favor of appellees that they were the owners of the real estate in fee simple as tenants in common, and that appellant was entitled to no part of the same, from which judgment appellant has appealed; and he assigns as error the overruling of his demurrer to appellees' second paragraph of cross-complaint and the sustaining of appellees' demurrer to appellant's first and second paragraphs of answer.

Omitting the formal parts and description of real estate, the writing which furnishes the subject-matter of this litigation reads:

"1. Whereas, the said Simon H. Boyer is desirous of settling and disposing of his estate among his children during his life; 2. And whereas the said Simon H. Boyer hereby agrees and has this 2d day of February, 1907, deeded to his son, the said Mahlon R. Boyer, the following described property, * * * and has executed in favor of said Mahlon R. Boyer, a release to a certain mortgage in the sum of Two Thousand Dollars (\$2,000) given by Arthur C. Goodwine on the 10th day of November, 1903, to the said Simon H. Boyer, on the following described real estate: * * * 3. And whereas said Simon H. Boyer in addition to the deeds and mortgage release above set forth has paid unto his son, the said Mahlon R. Boyer, the sum of \$500 in cash, the receipt whereof is hereby acknowledged. 4. Now, therefore, in consideration of the deeds, release of mortgage, and money this day received from his father, the said Simon H. Boyer, the receipt of which the said Mahlon R. Boyer hereby acknowledges, he the said Mahlon R. Boyer does by these presents waive, relinquish, and quitclaim to all other heirs and parties whatsoever all his rights, claims and interests as an heir in the remaining estate of his said father, and to any additional estate

that his father, the said Simon H. Boyer, may die seized of. And as a further consideration for thus receiving all his share of his father's estate in advance, the said Mahlon R. Boyer agrees to pay to his father, the said Simon H. Boyer the sum of Four Hundred and Twenty-five Dollars (\$425) annually during the lifetime of his father, the first payment to be made on the first day of April, 1908, and annually thereafter on the first day of April in each year."

It is appellant's contention that the right of inheritance is fixed by statute (§2990 Burns 1914, §2467 R. S. 1881), and that the foregoing contract is in violation of the law and is wanting in equity; that the devolution of property cannot be controlled by contract, such as is here under consideration; that to do so resort must be had to testamentary disposition, as provided by statute (§3132 Burns 1914, §2376 R. S. 1881), and in the absence of such disposition the estate left by appellant's father descended to his heirs and that the instrument in writing, so far as it seeks to prevent appellant from participating in such estate left by the ancestor is not sanctioned by the law and is void, and could serve only as evidence of an advancement made to appellant. This insistence is not without support. It has been held by some courts that an agreement for the relinquishment of an expectancy is not binding on the ground that it is impossible for an heir to traffic in his expectancy, something that has no existence and may never have. *Elliott v. Leslie* (1907), 124 Ky. 553, 99 S. W. 619, 124 Am. St. 418; *Needles v. Needles* (1857), 7 Ohio St. 432, 70 Am. Dec. 85; *Headrick v. McDowell* (1903), 102 Va. 124, 45 S. E. 804, 102 Am. St. 843, 65 L. R. A. 578; *Spears v. Shaw* (1909), 118 S. W. (Ky.) 275, 25 L. R. A. (N. S.) 436. In addition

to appellant's contention finding support in

1. the foregoing authorities, it may be stated generally that courts look with favor on an equal distribution of an estate cast upon heirs, and when it is disclosed that the heir received from the ancestor money or property during the lifetime of the ancestor, there is a presumption that the same was an advancement. *Ruch v. Biery* (1887), 110 Ind. 444, 11 N. E. 312; *Higham v. Vanosdol* (1890), 125 Ind. 74, 25 N. E. 140. However, the weight of authority seems to recognize as

2. valid instruments of writing of the import here under consideration. In other words, it seems to be laid down, as a general rule, by many jurisdictions of this country that an express agreement upon the part of a donee, in consideration of an advancement to waive and relinquish all further interest in the estate of the donor, is, in case the donor dies intestate, binding on the donee, and bars and estops him from claiming any further interest in the estate after the death of the donor. In support of this general proposition are the following decisions. *Galbraith v. McLain* (1877), 84 Ill. 379; *Kershaw v. Kershaw* (1882), 102 Ill. 307; *Simpson v. Simpson* (1885), 114 Ill. 603, 2 N. E. 258; *Roberts v. Coleman* (1892), 37 W. Va. 143, 16 S. E. 482; *Coffman v. Coffman* (1895), 41 W. Va. 8, 23 S. E. 523; *In re Simon* (1909), 158 Mich. 256, 122 N. W. 544, 17 Ann. Cas. 723; *Brown v. Brown* (1894), 139 Ind. 653, 39 N. E. 152; *Eissler v. Hoppel* (1902), 158 Ind. 82, 62 N. E. 692; *Trull v. Eastman* (1841), 44 Mass. 121, 37 Am. Dec. 126; *Nicholson v. Caress* (1877), 59 Ind. 39.

The reasons generally advanced by the courts in upholding contracts, such as the one before us, are that, when a child accepts and uses an advancement

given and received as his full distributive share of the estate, he is estopped from denying the express conditions in the instrument by virtue of which he received the advancement and, if he did not want to be so bound, he should not have received the same; and that sometimes the present use of a certain sum is worth more to a child than the uncertain prospect of sharing in the parent's estate, although the future share may in the end amount to many times the value of the advancement. There is no inhibition in the law which prohibits the child and the parent taking into consideration the size and character of the estate, the necessities and surroundings of the child, and from this fix a certain amount which when received by the child will be deemed equivalent to the child's full distributive portion of the ancestor's estate at the time of his death. And in this connection, it must be presumed that the parent relied upon the agreement and, but for it, would have made a will, which would be binding upon the child. In *Brown v. Brown*, *supra*, 658, the Supreme Court of this State, said: "Indeed, if a father may, by will, bestow his property upon some of his children to the exclusion of the rest, as he undoubtedly may, there seems no good reason why he may not enter into a fair and open contract with one or more of his children and give in advance all that he is disposed to give." And following the case of *Brown v. Brown*, *supra*, it was held in the case of *Eissler v. Hoppel*, *supra*; that it would be presumed that parents, dealing with the natural objects of their bounty, would be considerate of the rights and interests and are, therefore, left free to deal with their heirs as they deem just, and when such contracts are free from fraud and supported by a valuable consideration, courts of equity

will enforce them against the heirs after the death of the ancestor, although the contract may turn out to be disadvantageous bargains.

While the reason does not appear from the instrument in writing why appellant was confined to the estate thus advanced, we must presume that the father had reasons for so limiting him to the estate advanced. This he could have done by will, as the right to inherit is not a natural nor an inherent right. There being no fraud disclosed and the quitclaim and release being based upon a valuable consideration, in the light of the authorities, the court did not err in overruling appellant's demurrer to the cross-complaint of appellees nor in sustaining appellees' demurrer to appellant's affirmative paragraph of answer. Judgment affirmed.

NOTE.—Reported in 111 N. E. 952. Persons entitled to succeed to the estates of intestates, 12 Am. St. 81. Right of one receiving advancement and executing release of interest in estate to share in after-acquired property, 65 L. R. A. 578. Validity of the sale of an expectancy by a prospective heir, 25 L. R. A. (N. S.) 436. Validity and effect of an agreement by an heir relinquishing his expectancy in an estate in consideration of an advancement, 17 Ann. Cas. 725.

HITT ET AL. v. CARR.

[No. 8,529. Filed June 22, 1915. Rehearing denied October 15, 1915. Transfer denied January 7, 1916. Motion to set aside denial of transfer stricken from files May 22, 1916.]

1. JUDGMENT.—*Parol Evidence.*—*Unambiguous Transcript of Record.*—Where a defendant in a quiet title suit alleged by way of former adjudication that plaintiff, "Drusilla C.", had been made a party defendant by the name of "Rosela C." in a former suit to quiet title to the same land; that summons was issued on the complaint therein and served on "Drusilla C.", the theory being that "Drusilla C." had been sued in her wrong name and served in her true name, a transcript of the record in such former suit, not showing the summons, but reciting that "Rosela C." was duly summoned and defaulted and that judgment was rendered

- against her, was inadmissible in evidence in the absence of proof showing that the summons was actually served on plaintiff and, since the transcript was unambiguous independent of the summons and the return thereon, parol evidence was incompetent for the purpose of making such proof of service on plaintiff, even on a showing that such summons had been lost. pp. 90, 92.
2. EVIDENCE.—*Parol Evidence*.—*Unambiguous Transcript of Record*.—An unambiguous transcript of the record in a former suit cannot be affected or modified by parol evidence. p. 91.
 3. NAMES.—*Idem Sonans*.—*Issues*.—*Evidence*.—Under an answer of former adjudication alleging that plaintiff, "Drusilla C.", was made a party defendant in the former action by the name of "Rosela C." but not presenting the issue of *idem sonans*, a transcript of the record in such former suit was not admissible on the theory that the names were *idem sonans*. p. 92.
 4. NAMES.—*Idem Sonans*.—The names "Rosela Carr" and "Drusilla Carr" are not in fact *idem sonans*. p. 92.
 5. JUDGMENT.—*Conclusiveness*.—*Parties Bound*.—*Evidence*.—A judgment is binding on the parties or their privies, and the effect of a judgment must be mutual and reciprocal to conclude the parties, and no one can take advantage of a decree if he would not have been prejudiced by it had it been rendered in favor of the adversary of the prevailing party; hence a transcript of the judgment in a former suit, offered in evidence on behalf of all defendants, including one who was not a party to the former suit, was inadmissible on behalf of such defendant. p. 93.
 6. APPEAL.—*Rulings on Evidence*.—*Objections*.—On the overruling of an objection to evidence by the trial court, only the grounds of objection presented to the trial court will be considered on appeal; but if the objection is sustained, or the evidence excluded, the ruling will be sustained on appeal unless the appellant shows it was wrong on any theory, and the appellee may avail himself of any valid objection to the testimony as offered. p. 93.
 7. TRIAL.—*Evidence*.—*Admissibility*.—*Evidence Not Competent as to all Parties*.—There is no reversible error in excluding evidence offered jointly in behalf of several parties where it is incompetent as to some of them, nor in admitting it, if competent as to some, but in the latter case its application and effect must be limited by the trial court, and failure to do so on request of one against whom it is not competent would be reversible error. p. 94.
 8. TRIAL.—*Evidence*.—*Admissibility*.—*Evidence Not Competent as to all Parties*.—Where evidence is competent in behalf of some, and incompetent as to other, joint parties, it should be offered in behalf of those in whose favor it is competent, and when so offered should be received and considered so far as competent. p. 94.
 9. JUDGMENT.—*Evidence*.—*Evidence to Extend*.—*Admissibility*.—The testimony of an abstractor of titles that his company made an

abstract for a party to the action; that in preparing abstracts it was the custom of the company for some member of the office force to run the chain of title from their abstract books, and then the records would be examined, notations made of material data, including the substance of a complaint, summons and return thereon when in any suit affecting the property; and that he compared the abstract with the notes, numbered the pages and signed the company's name to it; and that he thought the abstract was compared with the original summons in a case affecting the property, though he had no special recollection about the matter or that he had ever seen the original summons, and did not make the notes from which the abstract was prepared, did not know who did, and that the notes had not been preserved, was inadmissible to vary or extend the effect of the judgment in such case beyond the scope indicated by the judgment roll itself. p. 94.

10. EVIDENCE.—*Private Records.—Abstract of Title.—Admissibility.*

—An abstract of title is not admissible in evidence for the purpose of showing copy of portions of summons and return in a former suit affecting the property abstracted on the theory that the item was a regular entry made by third parties in the due course of business, unless it should appear that the making of the abstract, including the reference to the summons and return, was a part of the *res gestae* of some transaction between the parties to the action in which it is offered and that the entries were contemporaneous with such transaction and made in the regular course of business, or that they were such entries made in the due course of business in some transaction between the party against whom they are offered and a third party under circumstances that gave them probative value under the issues. p. 96.

11. EVIDENCE.—*Private Records.—Abstracts of Title.*—An abstract of title prepared by an abstract company is a private record and its admissibility in evidence is not governed by the rules applicable to the admission of public records and documents. p. 96.

12. ADVERSE POSSESSION.—*Title.—Evidence.—Sufficiency.*—Evidence showing that in 1876, the purchaser of the land in suit looked at it and, being satisfied that it was worthless, told plaintiff that if she would live on it she might have it; that no notary being convenient he wrote off a description and handed his unrecorded deed to plaintiff with a promise to execute a deed to her later; that no deed was ever made, but plaintiff moved on the land, erected buildings at various places thereon and attempted to cultivate it, although it was worthless for cultivation; that she erected a dancing pavilion on the lake front; that her husband used the shore in his fishing business and erected structures necessary in such business; that plaintiff used the land as much as it was possible to do so and from time to time cut and sold small timber growing thereon; that she always asserted ownership to the exclusion of all other claimants and resided thereon for more than twenty years, except

for occasional periods of temporary absence, etc., was sufficient to show title by adverse possession to at least a portion of the land in controversy. p. 98.

13. ADVERSE POSSESSION.—*Title.—Evidence.—Sufficiency.*—Where there was no failure of proof as to any material element to sustain a finding of adverse possession the finding could not be affected on appeal by the fact that some of the evidence as to certain elements was conflicting. p. 103.
14. ADVERSE POSSESSION.—*Color of Title.—Void Deed.*—A deed void on its face, if containing a description sufficient to identify the land, may give color of title as effectually as though it were regular on its face, but void for reasons *dehors* the instrument, since the office of “color of title” is merely to define the extent of the land claimed by one asserting title. p. 106.
15. ADVERSE POSSESSION.—*“Color of Title.”—“Claim of Title.”*—“Color of title” is that which has the semblance or appearance of title, either legal or equitable, but which is in fact no title, while “claim of title” exists where one enters upon and occupies land with the intent to hold it as his own against the world irrespective of any foundation for such claim. p. 106.
16. ADVERSE POSSESSION.—*“Color of Title.”—“Claim of Title.”*—A claim of title, without color of title, may ripen into title to the land actually occupied by the claimant, but with color of title his title may be perfected to the whole tract indicated by that which gives the color of title, though he be in actual possession of only a part of such tract, if the part possessed is an integral portion of the whole tract. p. 107.
17. ADVERSE POSSESSION.—*Color of Title.—Knowledge by Holder of Legal Title.*—It is essential to the perfection of title by adverse possession that the holder of the legal title must have actual or constructive notice of the claim of right or title asserted by the one in possession, but it is not essential that he have knowledge of the existence of “color of title” in the latter in order that the latter may have the benefit thereof if it in fact exists. p. 107.
18. ADVERSE POSSESSION.—*Color of Title.—Instruments Constituting.*—An instrument in writing, or a survey, used by a donor of land or referred to by him in making a parol gift of land, under and in pursuance of which the donee has taken possession, will give color of title, though it does not purport to convey the land to such donee, if it so describes the land as to enable the donee to ascertain therefrom the boundaries and extent thereof. p. 107.
19. ADVERSE POSSESSION.—*Color of Title.—Party Conferring.*—In the absence of a statute requiring it, the grantor or donor of lands, or one from whom it is claimed by descent, may confer color of title without himself having any kind or semblance of title to the property. p. 108.
20. ADVERSE POSSESSION.—*Color of Title.—Instruments Constituting.*—A forged deed, or a lost deed, the contents of which have been proven, may give color of title. p. 108.

21. **EVIDENCE.—Parol Evidence.—Lost Deeds.—Color of Title.**—The contents of an instrument describing land conveyed or given to a claimant, and which has been lost or is beyond the jurisdiction of the court, may be proved by parol for the purpose of showing color of title. p. 108.
22. **ADVERSE POSSESSION.—Color of Title.—What Constitutes.**—While as a general rule color of title arises only from an instrument in writing describing the land claimed, a state of facts, pursuant to which the claimant is in possession, and which facts of themselves show the character and extent of his entry and claim, may sufficiently perform the office of color of title upon which to base a title by adverse possession, not only to the land actually occupied by the claimant, but to the full extent of the claim as thus shown. p. 108.
23. **ADVERSE POSSESSION.—Extent of Possession.—Findings.—Conclusiveness.**—Where the question of whether plaintiff was in actual possession of all the land claimed was an issuable fact, a finding for plaintiff on that issue, if warranted by the evidence, is conclusive on appeal. p. 114.
24. **ADVERSE POSSESSION.—Evidence.—Acts of Ownership.—Occupancy.—Character of Land.**—The character of real estate claimed by adverse possession is of controlling influence in determining what acts of ownership, use and occupancy will suffice to show possession of the whole tract claimed, and if the possession and other acts of ownership are such as are reasonably adapted to and in keeping with the beneficial use that may be reasonably made of such lands, and are such as are usually practiced by owners of similar lands in that vicinity and at the time in question, and such possession and acts of ownership are exercised in disregard of all conflicting claims without permission from any one, the inference of actual possession of the whole tract is warranted. p. 114.
25. **ADVERSE POSSESSION.—Acts Constituting.**—Adverse possession which affects the right of the true owner is that which exists and appears on the land itself, and where the occupancy is such as to indicate ownership and to furnish to the real owner, upon inquiry, information of the occupant's claim of title, and the character and extent of his possession, it is sufficient. p. 115.
26. **ADVERSE POSSESSION.—Evidence.—Sufficiency.—Color of Title.**—Evidence showing that in 1876 the owner of land bordering on Lake Michigan, believing that the same was of no value, told plaintiff that if she would live on it she could have it, and gave her the deed held by him with the promise to execute and send her a deed later; that plaintiff thereafter returned the deed requesting the owner to execute her a deed, but that no deed was ever made; that plaintiff lived on the property from the date of its presentation to her continuously for more than twenty years, excepting for occasional periods of temporary absence; that she caused buildings to be erected at various places on the land and made attempts to cultivate it, but that it was worthless for cultivation; that she

erected a dancing pavilion on the lake front; that her husband used the shore in his fishing business and erected structures necessary in such business; that plaintiff used the land as much as it was possible to do so and from time to time cut and sold small timber growing thereon; that she always asserted ownership to the entire tract to the exclusion of all other claimants, etc., established title by adverse possession in plaintiff to the land in controversy either on the theory that the deed left in her possession by the alleged donor gave her color of title, or that, independent of the question of color of title she had such actual, visible, hostile and uninterrupted possession under claim of ownership as to perfect her title. p. 117.

27. WITNESSES.—*Competency.—Transactions With Deceased Persons.*

—*Statute.*—Plaintiff, suing to quiet title to land alleged to have been given to her, was not incompetent under §522 Burns 1914, §499 R. S. 1881, to testify as to the transaction with the donor and as to the contents of a deed at that time left in her possession, on the ground that one of the defendants claimed an interest by inheritance from her parents who had died long prior to such transaction, since plaintiff's claim was not founded on a contract with or demand against defendant's ancestor "to obtain title to, or possession of, property * * * of, or in right of such ancestor," and the phrase "or to affect the same in any manner," as found in the statute, refers to the property mentioned in the statute and does not bring in a new class of cases not "founded on a contract with or demand against the ancestor." p. 118.

28. TRIAL.—*Evidence.—Admissibility.—Evidence Not Competent as to all Parties.*

—Where evidence as to transactions between plaintiff and the donor of land to which plaintiff sought to have title quieted was otherwise admissible, plaintiff was not incompetent to testify under §522 Burns 1914, §499 R. S. 1881, by reason of the mere fact that one of the defendants claimed an undivided interest by inheritance, since, if the testimony of plaintiff was incompetent as to such defendant, it would have been the duty of the court to admit it and limit its application by instructions to the jury. p. 121.

29. EVIDENCE.—*Declarations.—Res Gestae.—Admissibility.*

—Evidence given by the claimant of land by adverse possession, and by the members of her family and other witnesses, relating to declarations made and acts performed while in possession of the land, relating to the character and extent of claimant's possession and the use and control of the land by her and such members of her family under her directions, was competent to qualify, explain and characterize such possession, since such declarations and acts were part of the *res gestae* of the continuing act of possession. p. 121.

30. PLEADING.—*Complaint.—Amended Complaint.—Change of Venue.*

—Where, in a suit to quiet title, a verdict was returned

containing a correct description of the land in question, the filing of an amended complaint after change of venue was taken to another county, containing a corrected description identical with that contained in such verdict, was unobjectionable. p. 122.

31. PLEADING.—*Complaint.—Amendment.*—The amendment of the description in a complaint to quiet title, so as to correctly describe the land involved, is legitimate and is not ground for reversal, especially in the absence of any showing that defendants were prejudiced, misled or deprived of any defense thereby. p. 122.
32. ADVERSE POSSESSION.—*Evidence.—Sufficiency.*—The evidence was not insufficient to support plaintiff's claim of ownership and title by adverse possession, on the theory that the possession was in plaintiff's husband, because of the mere fact that he drove trespassers from the land, where there was evidence tending to prove all the essential elements of adverse possession in plaintiff and to show that the husband drove trespassers off at her direction. p. 123.
33. HUSBAND AND WIFE.—*Acquisition of Title by Wife.—Adverse Possession.*—A woman is not precluded from taking and holding the exclusive possession of land by the mere fact that she is married, though her marital relation is proper to be considered along with other evidence bearing on the question of possession in her. p. 124.
34. APPEAL.—*Review.—Verdict.—Conclusiveness.*—Although the evidence is conflicting, if there is no failure of evidence, a verdict based thereon is conclusive, since the court on appeal cannot weigh or ignore evidence. p. 124.

From Laporte Superior Court; *James F. Gallaher*, Special Judge.

Action by Drusilla Carr against Rosa M. B. Hitt and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Erwin McDowell, John H. Gillette, Osborne & McVey, Meeker & Hershman, Hodges & Ridgley and John R. Cockran, for appellants.

Henry Warrum, Ballard & Stanton, D. E. Kelley and A. C. Carver, for appellee.

John L. Davidson and Korbly & New, Amici Curiae.

FELT, J.—This suit was brought by appellee against appellants and others to quiet title to certain real estate. There were two paragraphs

of amended complaint. The first contains the usual formal averments to quiet title and alleges that appellee is the owner in fee simple of real estate in Lake County, Indiana, described as follows: "Lot one (1) in section thirty-one (31) in township thirty-seven (37) north, range seven (7), west, of the second principal meridian, and all that part of said section thirty-one (31) lying north and west of said lot one (1) above described, being all of the land lying south of lake Michigan and north and west of the Grand Calumet river in said section thirty-one (31)". It is also alleged: "That on or about the month of March, 1876, this plaintiff under claim of right and color of title took the exclusive possession, control, and absolute dominion and use of all the said real estate, and has continuously under said claim of right, with full notice to the world, since said time, lived upon, occupied, cultivated, as far as said real estate was possible, or susceptible of cultivation, cultivated, improved, and used all of said real estate for every purpose to which it was adapted, or of which it was capable of use, and during all of said time has asserted, exercised, and claimed the absolute ownership, unrestricted right, use and title of and in all of said real estate; that for more than twenty years continuously last past, she has had, under claim of right, the actual, hostile, open, notorious, exclusive and continuous possession of said real estate, and of every part thereof; that plaintiff's said claim and use and enjoyment of said real estate, as aforesaid, has been adverse, visible, and uninterrupted, during all of said time." The second paragraph alleges that appellee is the owner in fee simple of the real estate described in the first paragraph of amended complaint, and also contains the usual averments to quiet title,

which are omitted here because not controverted.

Appellants, other than Rosa M. B. Hitt, separately demurred to each paragraph of amended complaint, on the ground that the facts alleged are insufficient to state a cause of action. Each demurrer was overruled and an exception taken. Appellant Rosa M. B. Hitt answered by general denial each of the allegations of the amended complaint as to all land lying north of the Indian boundary line, also known as the "ten mile" line. She also filed a second paragraph of answer in which she alleged in substance that the "defendant Mary H. B. Hitt and Winchester W. Hall", in August, 1903, were the owners of all the fractional quarter west of the Calumet River and north of the Indian boundary line, of the north half of section 31, township 37 north, range 7 west, of the second principal meridian, containing 64.51 acres; that on August 28, 1903, said owners filed suit in the circuit court of Lake County, Indiana, against a large number of persons to quiet title to said real estate and appellee was a party to the suit under the name of "Rosela Carr"; that summons was duly issued and served on "Drusilla Carr"; that Drusilla Carr did not appear and was defaulted and judgment was duly entered against her quieting the title to said real estate in said Hitt and Hall, which judgment is in full force and effect; that since the rendition of said judgment she (Rosa M. B. Hitt) has acquired an interest in said real estate from said Mary H. B. Hitt by conveyance. By her third paragraph of answer, appellant Rosa M. B. Hitt disclaimed any interest in the other real estate described in appellee's amended complaint.

Appellant Arza B. Hitt filed answers similar to those of Rosa M. B. Hitt, in which he alleges

that since title to said real estate was quieted in Mary H. B. Hitt and appellant Hall, he has acquired an interest therein by conveyance from Mary H. B. Hitt. Appellant Hall also filed answers similar to those of Rosa M. B. Hitt. Appellant Mathieu filed answer in two paragraphs, the first of which was similar to the answer of Rosa M. B. Hitt. The second paragraph alleges that appellant Mathieu and certain other parties in August, 1903, were the owners of an undivided one-sixth part of the real estate described in appellee's amended complaint, as tenants in common with one Mary H. B. Hitt and appellant Hall. The answer then alleges the facts about the suit of appellant Hall and Mary H. B. Hitt, in 1903, to quiet title to said real estate, and avers that since the rendition of the judgment in that case she has acquired certain interests in said real estate from said persons, other than the plaintiffs in that suit, and now owns the undivided one-sixth part thereof as tenant in common with the other appellants who are alleged to own the undivided five-sixths part of said real estate; that the title acquired by the plaintiffs in said suit to quiet title in 1903 enured to her benefit by reason of the fact that at the time the judgment was rendered she was an owner as tenant in common, with the plaintiffs in the suit, of the real estate to which the title was quieted as aforesaid. Appellee replied to the special answers by general denial.

Appellant Mathieu filed a cross-complaint against appellee to quiet her title to the portion of the real estate she claimed to own. To this cross-complaint, appellee filed a general denial. The cause was tried by a jury and a verdict was returned in favor of appellee on her amended complaint and in her favor on the cross-complaint of appellant

Mathieu. Judgment was rendered on the verdict quieting appellee's title to the real estate described in her amended complaint.

The errors assigned and relied on for reversal are: (1) The overruling of appellants' motion for a new trial; (2) the overruling of the separate motion of each of the appellants for a new trial; (3) that the Laporte Superior Court had no jurisdiction of a part of the real estate involved in the judgment of that court, viz., as to the land lying north of lot No. 2 thereof, according to the government plat. A new trial was asked on the grounds: (1) That the verdict of the jury is not sustained by sufficient evidence; (2) that the verdict is contrary to law. (3) That the court erred in refusing to give to the jury certain instructions tendered by appellants; (4) in giving to the jury certain instructions; (5) in the admission of certain evidence; (6) in permitting appellee to testify in answer to certain questions; (7) in excluding certain evidence offered by appellants; (8) and in refusing to permit appellants to read in evidence a certified copy of the record in the case of *Hitt, et al. v. Lightener, et al.*, cause No. 6,444 of the Lake Circuit Court.

We first consider the alleged error in excluding the transcript of the record offered in evidence.

The several answers of former adjudication

1. allege that appellee was made a party defendant to the former suit to quiet title by the name of "Rosela Carr"; that summons was issued on such complaint, but was served on "Drusilla Carr". The answers do not proceed on the theory that the names are *idem sonans* or that appellee was commonly known as "Rosela Carr", but upon the theory that "Rosela Carr" was sued and the process against her was served on "Drusilla Carr", the appellee in this suit. In other words, that Drusilla

Carr had been sued in her wrong name and served in her true name. Appellant Mathieu was not a party to the former suit. The record was offered in evidence on behalf of all the defendants and was objected to, on the ground that it does not show that appellee was a party to that suit; that she was served with process; that she was defaulted; that she appeared to the action, or that judgment was taken against her. Appellants urged the admission of the transcript in evidence on the ground that they had shown the loss of the summons, and that the names were "substantially *idem sonans*." The name of appellee does not appear in the transcript offered in evidence, but the name "Rosela Carr" does appear throughout the record of the proceedings. The transcript offered in evidence shows that "Rosela" Carr was duly summoned; that she was defaulted, and that judgment was rendered against her. Appellants did not claim that they had offered proof to show that the summons in the case issued against "Rosela" Carr had been served on appellee, nor did they state to the trial court that they proposed to make such proof. The transcript of the judgment rendered against "Rosela" Carr would not tend to prove the allegation of the answer that the summons issued against "Rosela" Carr had been served on appellee. The transcript shows that "Rosela Carr" was duly served with process, and that upon her failure to appear and answer the complaint, she was defaulted and judgment was rendered against her. So far as the record of the proceedings is evidenced by the transcript, it is unambiguous and can not be affected or modified by parol evidence.

2. *Mitten v. Caswell-Runyan Co.* (1913), 52 Ind. App. 521, 527, 528, 99 N. E. 47, and cases cited. Until evidence was offered tending

to prove that the summons, not shown by the transcript though legally a part of the record,

1. was actually served on appellee, the record of the judgment was not admissible in evidence, and could only be received after such proof had been made, for the purpose of proving what was adjudicated. *Mitten v. Caswell-Runyan Co.*, *supra*, 525.

The issue raised by the answer was one of identity of person. As already shown, it is not averred that "Rosela" and "Drusilla" are *idem sonans*, nor that appellee was commonly known as "Rosela," but it is clearly averred that the process was issued against "Rosela" and served on Drusilla Carr, the appellee in this case. To sustain this answer required proof that the summons was actually served on appellee and that the return on the summons showed service on Drusilla Carr, else there would be no basis of ambiguity in the record that would permit parol proof to show anything different from that which appears on the face of the judgment roll independent of the summons and the return thereon. The loss of the summons did not aid the offer of the unambiguous transcript of the judgment roll, though it would be an important consideration when proof was offered of the contents of the summons and the return thereon.

The statement that the names were *idem*

3. *sonans* did not render the transcript admissible, (1) because the special answer does not present such issue, and (2) because the

4. names are not in fact *idem sonans*. *Jenkins v. Steele* (1913), 55 Ind. App. 11, 102 N. E. 139, 103 N. E. 365, and cases cited; *State v. McCormick* (1895), 141 Ind. 685, 40 N. E. 1089.

As already shown, the offer of the transcript was made jointly by all the appellants, and appellant

Mathieu was not a party to the judgment. Aside from the reasons already shown, the transcript was not competent evidence in her behalf, notwithstanding the averments of her answer that she was a tenant in common with the plaintiffs in that suit and had acquired additional interests in the real estate from parties other than her coappellants, since the rendition of the judgment, the record of which was offered in evidence. A judgment is binding on parties or their privies, and the effect of the judgment must be mutual and reciprocal to conclude the parties. No one can take advantage of a decree if he would not have been prejudiced by it, had it been rendered in favor of the adversary of the prevailing party. *Maple v. Beach* (1873), 43 Ind. 51, 58; *Hoosier Stone Co. v. Louisville, etc., R. Co.* (1892), 131 Ind. 575, 582, 31 N. E. 365; *Finley v. Cathcart* (1898), 149 Ind. 470, 477, 48 N. E. 586, 49 N. E. 381, 63 Am. St. 292; 1 Freeman, Judgments (4th ed.) §159; 24 Am. and Eng. Ency. Law 730; 23 Cyc 1238-1253.

When an objection to the admission of evidence is overruled, no grounds of objection will be considered on appeal, except those presented to the trial court. But, where an objection is

6. sustained or the evidence has for any reason been excluded, the ruling will be sustained unless the complaining party shows that the ruling was wrong on any theory. If an objection is made and sustained, and the party who offered the evidence takes an appeal, the appellee on appeal may avail himself of any valid objection to the testimony as offered, and is not limited by the objection made at the time the evidence was excluded. *Haas v. C. B. Cones, etc., Co.* (1900), 25 Ind. App. 469, 471, 58 N. E. 499; *Whitney v. State* (1900), 154

Ind. 573, 577-578, 57 N. E. 398; *Leach v. Dickerson* (1896), 14 Ind. App. 375, 376, 42 N. E. 1031.

Appellee did not object on the ground that

7. the offer was made on behalf of all the appellants, and that appellant Mathieu was neither a party nor a privy to the judgment, but if the evidence had been otherwise admissible, the trial court did not commit reversible error in excluding it, when offered jointly on behalf of all the appellants in the manner above shown. Where evidence is offered jointly on behalf of several parties, which is competent in behalf of some, and incompetent as to others in whose behalf it is offered, it is not reversible error to exclude it when so offered. *Fowler v. Newsom* (1910), 174 Ind. 104, 113, 90 N. E. 9; *Malone v. Stickney* (1883), 88 Ind. 594, 597. Where it is competent as to part, it would not, however, be reversible error to admit it, but it would in such case be the duty of the trial court to limit its application and effect according to its competency, and it would be reversible error to fail so to do on request of a party against whom it was not competent. Where

evidence is competent in behalf of some,

8. and incompetent as to other, joint parties, it should be offered on behalf of those in whose favor it is competent, and when so offered should be received and considered so far as competent. *Benjamin v. McElwaine-Richards Co.* (1894), 10 Ind. App. 76, 82, 37 N. E. 362; *Thistlewaite v. Thistlewaite* (1892), 132 Ind. 355, 357, 31 N. E. 946; *Smith v. Meiser* (1894), 11 Ind. App. 468, 470, 38 N. E. 1092.

Appellants showed that search for the summons issued in the case of *Hitt v. Lightener, et al., supra*, had been made and that it could not be found.

9. They then offered to prove the contents of the return on the summons by Walter L. Allman,

an abstracter of titles, who testified that his company had made an abstract of title for appellant Hall for a part of section 31, north of the Indian boundary line, in July, 1906. He testified that in preparing abstracts it was the custom of his company for some member of the office force to run the chain of title from their abstract books and then the records would be examined, notations be made of all material data, including the substance of a complaint, summons and return thereon when the suit affected the property; that he himself compared the abstract with the notes, numbered the pages and signed the firm name to the Hall abstract; that he thought the abstract was compared with the original summons in said case; that he had no special recollection about the matter and no definite recollection that he ever saw the original summons; that he did not make the notes from which the abstract was prepared, did not know who did make them, and the notes had not been preserved. By this proof appellants seek, in a collateral proceeding, to extend the effect of a judgment beyond the scope indicated by the judgment roll itself. The witness does not show that he knew the contents of the summons and return from any personal knowledge or from having seen the originals, but that his information was obtained from notes, or secondary evidence, procured by some member of the office force. His opinion that the abstract was compared with the originals, based on his whole statement shows that it was his conclusion based on his idea of the abstract company's manner of doing business, and not on any actual knowledge of the facts in this particular instance, nor from any inspection of the originals made by him at any time or place. Information so remote from original sources, so general and indefinite in its character

is not admissible as proof to vary or extend the effect of a judgment regular on its face. 1 Elliott, Evidence §§461, 462; 2 Elliott, Evidence §§1476, 1477, 1478; 1 Wigmore, Evidence §§656-659, 666; 2 Ency. Evidence 264; *Wiggins v. Holley* (1858), 11 Ind. 2, 11.

A portion of the abstract of title made for appellant Hall as above shown was offered in evidence for the purpose of showing the abstracter's

10. memoranda or copy of portions of the summons and return in question. The abstract was excluded and appellants contend that it should have been admitted on the theory that it was a regular entry made by third parties in the due course of business. To be admissible under the rule invoked, it should appear that the making of the abstract, including the reference therein to the summons and the return of the sheriff thereon, was a part of the *res gestae* of some transaction between appellee and appellants, and that the entries offered in evidence were contemporaneous with such transactions, and made in the regular course of business, or that they were such entries made in the due course of business in some transaction between appellee and a third party under circumstances that gave the entries probative value under the issues of the case on trial. The offer made was a private entry and the rules applicable to the ad-

11. mission of public records and documents have no application. There is no fact or circumstance shown which so connects appellee with the making of the abstract as to render it competent evidence against her under the

10. issues of the case. *State, ex rel. v. Central, etc., Bridge Co.* (1912), 49 Ind. App. 544, 549, 97 N. E. 803, and cases cited; *Johnson v. Zimmerman* (1908), 42 Ind. App. 165, 173, 84 N. E.

541; *Fleming v. Yost* (1894), 137 Ind. 95, 97, 36 N. E. 705; *Place v. Baugher* (1902), 159 Ind. 232, 234, 64 N. E. 852; *Rouyer v. Miller* (1896), 16 Ind. App. 519, 526, 44 N. E. 51, 45 N. E. 441, 443, 61 N. E. 683; *Barnett v. Lucas* (1901), 27 Ind. App. 441, 443; 1 Elliott, Evidence §§454-456, 459-462; 1 Greenleaf, Evidence §§115-120; *Culver v. Waters* (1910), 248 Ill. 163, 167, 93 N. E. 747. We find no instance where the rule of admitting the account or other books of third parties as evidence has been carried to the extent contended for by appellants in the case at bar. The entries of books in a bank have been received to show the state of the account of a depositor who was in litigation with a third party, but in such instance the person against whom the evidence was received was a party to the transaction with the bank and the entries received as evidence were a part of the *res gestae* of such transactions. But here the abstract was compiled long after the issuance and return of the summons, and appellee was in no way a party to the making of the abstract which, at most, was only the private memoranda of the abstract company, purporting to give a digest or summary of the public records affecting the real estate for which the abstract was prepared. Aside from the character of the instrument offered, it was wanting in the essential element of being a part of the *res gestae* of any transaction to which appellee was a party and was therefore properly refused as evidence. *Marks v. Box* (1913), 54 Ind. App. 487, 500, 103 N. E. 27; *Culver v. Marks* (1890), 122 Ind. 554, 563, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. 377; *Cleland v. Applegate* (1894), 8 Ind. App. 499, 500, 35 N. E. 1108; *Myer v. Brown* (1902), 130 Mich. 449, 90 N. W. 285; *State, ex rel. v. Central, etc., Bridge Co.*, *supra*. The cases cited

by appellants where abstracts of title have been received in evidence in states having statutes that make them admissible, under certain specified conditions, have no application to the question presented here.

The evidence relating to color of title and appellee's possession and use of the land, omitting many details, is in substance as follows: Appellee testified that in March, 1876, she and her

12. husband were living near the land in controversy at what was called "the blowout"; that a Mr. Bingham came to their house and said he had a deed for some land and had been informed that her husband was well acquainted with the land and would show him around; that her husband and Mr. Bingham looked at the land and returned to their house in the evening; that Mr. Bingham said he was sick and tired and disgusted with his land and that he had been buncoed; that his best land lay out in the river; that he would not have it and that it was not worth having his deed recorded; that she said to him, "Mr. Bingham, if you don't want the land, give it to me," and he said, "Mrs. Carr, if you will move on this land and live on it, you can have it"; that he looked around again the next day and said he would have to go back home, and that he asked where he could get a notary public, and she told him the nearest one was at Hobart; that he refused to go that far, but he wrote off the description from the deed and said he would take it with him; that he had a friend who was a notary public and would do the work for nothing; that he would make the deed and send it to her; that he gave her his deed and told her to keep it until he sent the deed to her; that he had told Mr. Crockett, who was living on the land, that he had given the land to appellee and that he must sur-

render possession to her and that Crockett had agreed to do so; that he had taken possession of the land described in the deed, and she should take possession of all of it; that she did take possession of all the land in March, 1876, as soon as they could cut the logs and erect a one-room log cabin; that they built the house from timber growing on the land; that she did not receive a deed from Mr. Bingham, but in the fall of that year she received a letter from him, which she had lost and was unable to find; that the letter came from Philadelphia, Pennsylvania, and Mr. Bingham stated in it that he had lost his copy of the description of the land and requested her to send the deed he left with her; that she sent him the deed and never heard from him again, but that she had written to him twice; that through her husband she afterwards consulted a lawyer about the deed, and he told her it would not do her much good as they had lived on the land twenty years and it was hers anyway.

In answer to a question, appellee stated her recollection of the substance of the deed as follows: "I now convey all the land between Lake Michigan and the Grand Calumet River and west of its mouth in section 31 in Lake County, Indiana"; that the deed was to Mr. Bingham but she did not remember his christian name or the name or names of the grantors. There was also evidence tending to prove that in March, 1876, appellee and her husband moved on the west end of the land in controversy, in a cabin located about 200 or 300 feet south of Lake Michigan and about the same distance east of the west line of said section 31; that about that time her husband blazed the trees along said section line which was the west boundary of the land claimed by appellee, which in answer to a question she described as lying "South of Lake

Michigan, north of the Grand Calumet river and west of its mouth, in section 31 in Lake county, Indiana"; that she and her husband lived at that place continually until November, 1877, when they moved into a one-room log house on the eastern part of the land now claimed by appellee, situated north of the Indian boundary line and near the bend of the river, at which place they continued to reside for eight or nine years and then moved into a frame house erected about 400 feet northeast of the log house which frame house was north and west of the Grand Calumet river; that they continued to live at that place until 1896, when they moved to their present location near the gravel road, about 200 feet south of Lake Michigan, 300 feet east of the gravel road and 800 feet from the river; that they moved their two rooms and added one room and a porch; that they also erected and used at the latter two places an ice house, a fish house, a large barn to accommodate horses of persons who came to the lake, erected hitch racks and a bowery with a platform for dancing.

The evidence also tended to show that the principal business of appellee's husband and her sons was fishing, hunting and trapping; that they erected such structures along and near the lake shore of said land as were useful in fishing; that they used boats, a windlass, and piling driven in the lake; that they prepared their nets on the land and cleaned and prepared their fish for market in the fish house; that the family served meals and refreshments to people who visited the lake; that they tried to raise flowers, planted a garden at different times, sowed oats and grass seed and set out fruit trees, but the sand always covered them up and it was impossible to raise anything of that kind; that the land was very rough, and consisted of sand washed

up from the lake, which from the action of the waves and the wind shifted and drifted so that it was impossible to raise vegetation if the soil had been otherwise productive, but it was not; that there was some timber growing on the land, especially along the river, consisting of oak, white pine, yellow pine, cedar and poplar; that appellee sold some firewood, fence posts and logs from the land and the family procured firewood from the timber on the land and cut and sold cedar for Christmas trees; that they cut ice from the river and put it up on the land for use in their fishing business and trapped along the river which formed the southern and eastern boundary line of the land claimed by appellee; that they employed men to help in fishing, and after their sons were large enough they helped and after the death of Mr. Carr they carried on the work for appellee.

Appellee also testified in substance that soon after they moved on the land in 1876, she told her husband not to allow people to cut wood on her land and to keep trespassers off of it; that at times he had driven trespassers from the land; that she herself had caused trespassers to leave and to settle for timber they had damaged on her land; that prior to the construction of the gravel road sixteen years before the trial in 1912, there were only two other people on the land and they were there by her consent; that those that had occupied portions of it along the lake since that time had procured her consent either directly or through some other member of her family; that she had spoken about her claim to this land to her husband, Robert Carr, to a Mr. Dutcher, a Mr. Adams and a Mr. Blake, while on the land, and that long prior to the institution of this suit when it was suggested by Mr. Blake or Mr. Dutcher that it was government

land she told them that it was not, and that it belonged to her; that about sixteen or seventeen years before the trial, in the presence of her husband, she told Mr. Dutcher and Mr. Blake that she owned the land between Lake Michigan and the Grand Calumet River west of its mouth in section 31, in Lake County, Indiana; that she had talked with different people about selling or leasing portions of the land in question at different times while occupying it, and claimed to own it; that she raised a family of six children while living on the land, the oldest, Edward Carr, being 36 years of age at the time of the trial, the others being named, respectively, Clara Rosalie, Frederic William, Henry Robert, Nettie Elenor, and Myrtle Catherine; that her husband sometimes did work for other people when not fishing; that the fishing season was from the middle of April to the middle of October; that her home has always been on the land since 1876, but after 1883, she sometimes resided in Miller in the winter to school her children, and was away from the lake a few times during confinement; that when away she always left some one in charge of the place and her absence was only temporary; that she moved to Indiana Harbor in November, 1902, and her husband died there in the following month; that she moved back to the lake in February, 1904, and has continued to reside there on the land in question; that she left some things at the home on the lake when she went to Indiana Harbor and that her sons were with her there a part of the time, and part of the time were at the lake fishing for her, and she saw them at the lake every week or two; that at no time during her occupancy of the land did she see or hear of any of the appellants being on the land; and that neither appellee nor any one in her behalf had paid the taxes on the land.

The evidence did not show that any one had paid taxes on the land in controversy prior to 1886, but showed that after that time appellants had paid taxes on the land in section 31 north of the Indian boundary line. The evidence also showed that the land had not been fenced except some small portions near the buildings during a portion of the time, but there was evidence tending to show that the blazing along the west line was still observable ten or fifteen years after appellee first took possession of the land. There was evidence tending to show that Hitt caused a survey of a portion of the land in 1889, but appellee denied any knowledge thereof and stated that the first time she had any information about an attempt to survey was in 1904; and all she knew about that was that she saw men with a "machine" on their backs. There was evidence tending to prove that the Hitts had made some leases of small portions of the lake front along this land for small or nominal considerations in 1901.

Appellee asserts that the facts of this case shown by the evidence, including the location, nature and character of the land, are sufficient to establish her title to all the land described in her amended complaint on two grounds, viz.: (1) She had actual adverse possession for over twenty years; (2) she took and held adverse possession of the land under color of title, from March, 1876, to the present time.

Beyond question, the evidence is sufficient to support the verdict of the jury on the propositions that appellee had open, notorious, continuous, uninterrupted, hostile possession, under a claim of ownership, for over twenty years, of at least a portion of the land in controversy. There is

13. a conflict of evidence on some elements of her adverse possession, but no failure of proof of any material element and, under the well-established rules of appellate procedure, this is sufficient to sus-

tain the verdict on such propositions. *McBeth v. Wetnight* (1914), 57 Ind. App. 47, 106 N. E. 407, 409; *Worthley v. Burbanks* (1897), 146 Ind. 534, 539, 45 N. E. 779.

It is not denied by appellant that, if appellee held adverse possession of all the land in question for the requisite time, or held such possession of a portion of it under color of title, thereby she may have acquired title to the whole tract. But appellant asserts that there is a total failure of evidence to support either of such propositions. We first consider the question of color of title. Appellants contend that color of title can only be shown by an instrument in writing that purports to convey the title to the claimant or some one in privity of interest with him, but which for some reason is ineffectual to convey title. On the other hand, appellee asserts that "color of title is the claim of ownership under which a disseizor of land may enter, based on some transaction or relation which creates in him an apparent title, but which in fact is no title. It may grow out of a written instrument or matter *in pais*." As presented by the briefs, the real question at issue on this subject will be determined by ascertaining whether in this State, in a suit of this character, color of title may be shown without an instrument in writing purporting to convey the real estate in question to the one asserting title or to some one in privity of interest with such person. Our examination of the numerous decisions and law books which deal with the question of color of title makes it apparant that the authorities are not in harmony on the subject. Some states have statutes which require color of title to be evidenced by an instrument in writing purporting to convey title to the claimant or to some one in privity of interest with him; while others, without such statutes, have by deci-

sions adopted the same rule. On the other hand, many of our states have by decisions of the courts of last resort held that color of title may be shown by matter *in pais*; that a parol gift of land followed by adverse possession of the tract for the requisite time will suffice to establish title to the whole tract. In some cases it is held that the possession of the donee is referable to the gift and extends to the limits of the boundaries of the land given; while in other cases it is held that possession for the requisite time by the donee will give title to the whole tract where there are acts, signs or indications from which the extent of territory or boundaries may be ascertained. 2 C. J., "Adverse Possession" §§326-393. As supporting the view that there may be color of title without an instrument in writing purporting to convey the land to the one asserting title by adverse possession, we cite the following: *Bell v. Longworth* (1855), 6 Ind. 273; *Vancleave v. Milliken* (1859), 13 Ind. 105, 108; *Wilson v. Campbell* (1889), 119 Ind. 286, 290, 21 N. E. 893; 1 R. C. L. 708 and cases cited; *M'Call v. Neely*, 3 Watts (Pa.) 69, 72; *Brown v. Norvell* (1910), 96 Ark. 609, 613, 132 S. W. 922; *Wilkinson v. Bottoms* (1911), 174 Ala. 122, 124, 56 South. 948; *Rannels v. Rannels* (1873), 52 Mo. 108, 113; *Hughes v. Israel* (1881), 73 Mo. 538, 547; *McClellan v. Kellogg* (1856), 17 Ill. 498, 501; *Teabout v. Daniels* (1874), 38 Iowa 158, 161; *Niles v. Davis* (1883), 60 Miss. 750; *Davis v. Davis* (1891), 68 Miss. 478, 480, 10 South. 70; *Taylor v. Buckner* (1819), 2 A. K. Marsh. (Ky.) 18, 12 Am. Dec. 354; *Green v. Kellum* (1854), 23 Pa. St. 254, 62 Am. Dec. 332, 333; *Tennessee, etc., R. Co. v. Linn* (1898), 123 Ala. 112, 125, 26 South. 245, 82 Am. St. 108; 2 Smith, Leading Cases (8 Am. ed.), 711; 2 C. J. 196, §393 and cases cited, 198, §399. Buswell, Limitations and Adverse Possession, §§264, 265, 267, 268. Sedgwick & Wait, Trial of Titles, §§77, 2773, 1 Am. and Eng. Ency. Law 848.

It has been held in this State, and the weight of authority elsewhere is, that a deed void on its face may give color of title as effectually as though the deed were regular on its face, but void for

14. reasons *dehors* the instrument. *McBeth v. Wetnight, supra*; *Irey v. Markly* (1892), 132 Ind. 546, 32 N. E. 309; *Wright v. Kleyla* (1885), 104 Ind. 223, 224, 4 N. E. 16; *King v. Carmichael* (1893), 136 Ind. 20, 27, 35 N. E. 509, 43 Am. St. 303; *Sims v. Gay* (1887), 109 Ind. 501, 504, 9 N. E. 120; *Walker v. Hill* (1887), 111 Ind. 223, 236, 12 N. E. 387; 2 C. J. 176, §338, and cases cited under note 87. The foregoing rule is generally held applicable even in states that require color of title to be shown by conveyance in writing. The reason is that color of title does not give title, but its principal office is to define the extent of the land claimed by the one asserting title. For this reason it has generally been held that a deed purporting to convey real estate, but which gives no description or means of identifying the real estate will not give color of title, because it is wholly wanting in the essential characteristic of color of title whether shown by an instrument in writing or by matter *in pais*. *Wilson v. Johnson* (1896), 145 Ind. 40, 49, 38 N. E. 38, 43 N. E. 930; 2 C. J. §§323, 325, 331, pp. 168, 172; §339, p. 177; §364, p. 189; Sedgwick & Wait, *Trial of Titles* §772, p. 582; *Napier v. Little* (1911), 137 Ga. 242, 73 S. E. 3, 38 L. R. A. (N. S.) 91, 96; Ann. Cas, 1913A, 1013; *Randolph v. Casey* (1897), 43 W. Va. 289, 293.

The terms "color of title" and "claim of title" have been somewhat confused in many decisions and by some text-writers. Color of title is

15. that which has the semblance or appearance of title, either legal or equitable, but which is in fact no title. Claim of title exists where one enters upon and occupies land with the intent to

hold it as his own against the world, irrespective of any foundation for such claim. Claim of title without color of title may ripen into title to the land actually occupied by such claimant; but with

16. color of title, his title may be perfected to the whole tract indicated by the instrument or state of facts which give color of title, though he be in actual possession of only a part of such tract, but the part possessed must be an integral portion of the whole tract indicated by the facts or instrument by which color of title is shown. *McBeth v. Wetnight, supra; Bell v. Longworth, supra; Wilson v. Johnson, supra; Wilson v. Campbell, supra; City of Noblesville v. Lake Erie, etc., R. Co.* (1891), 130 Ind. 1, 5, 29 N. E. 484; 1 R. C. L. 706, 707; 2 C. J. §§323, 324, p. 168; *Allen v. Mansfield* (1891), 108 Mo. 343, 348, 18 S. W. 901; *Bartlett v. Secor* (1883), 56 Wis. 520, 525, 14 N. W. 714.

To be effective in perfecting title by adverse possession, the person holding the legal title must

have either actual or constructive notice of
17. the "claim" of right, or title, asserted by the one in possession of the property; but it is not essential that he have knowledge of the existence of "color of title" in such person to give the one in possession the benefit of "color of title", if he in fact has color of title to the real estate in his possession. *Tennessee, etc., R. Co. v. Linn, supra;* 1 R. C. L. 707.

An instrument in writing or a survey used by the donor, or referred to by him, in making a parol gift of lands under and in pursuance of which

18. the donee has taken possession of the lands so given him, will give color of title, though it does not purport to convey the land to such donee, provided it gives such description of the land given as will enable the donee to ascertain therefrom the boundaries and extent of the territory

included in such gift. *Bell v. Longworth, supra; Sedwick v. Ritter* (1891), 128 Ind. 209, 213, 27 N. E. 610; *Rannels v. Rannels, supra; Hughes v. Israel, supra; M'Call v. Neely, supra; Taylor v. Buckner, supra; Tennessee, etc., R. Co. v. Linn, supra; Green v. Kellum, supra; McClellan v. Kellogg, supra; 2 C. J. §§362-364, p. 188, §§370, 371, p. 191, §§388-390, 392, pp. 189-190. Unless there is a statute requiring it, the grantor or donor of lands, or one from whom it is claimed by*

19. descent, may confer color of title without himself having any kind or semblance of title to the property. 2 C. J. §§351, 352, pp. 184-185, §367, p. 190, §399, p. 198; *O'Donahue v. Creager* (1889), 117 Ind. 372, 376, 20 N. E. 267; *Wright v. Wright* (1884), 97 Ind. 444, 447; *Bell v. Longworth, supra; Teabout v. Daniels, supra; 1 Am. and Eng. Ency. Law* 852; *Henry v. Brown* (1904), 143 Ala. 446, 39 South. 325; *Crowder v. Doe* (1909), 162 Ala. 151, 50 South. 230, 136 Am. St. 17. A forged deed, or a lost deed, the contents of

20. which have been proven, may give color of title. 2 C. J. §§367-371, pp. 190, 191; *Harrison v. School Dist., etc.* (1886), 89 Mo. 184, 187, 1 S. W. 30; *Oliver v. Pullman* (1885), (C. C.) 24 Fed. 127, 129. Where there was an instrument

in writing describing the land conveyed or
21. given to the claimant, if such instrument is lost, or is beyond the jurisdiction of the court, the contents thereof may be proven by parol. 2 C. J. §371, p. 191; *Jones v. Levi* (1881), 72 Ind. 586; *Johnson Harvester Co. v. Bartly* (1884), 94 Ind. 131.

As giving expression to the views of some of the courts on the general proposition of showing color of title by matter *in pais*, we note the

22. following: *Bell v. Longworth, supra*, is the only case in Indiana that is a clear and

definite authority on the proposition, though the doctrine is recognized in other decisions already cited in this opinion under the general proposition, *supra*. It appears from the opinion in *Bell v. Longworth, supra*, that Harrison and Beaman in 1817, purchased from the United States Government a quarter section of land for which they paid one-fourth of the purchase price of \$2 per acre and obtained credit for the balance. Harrison and Beaman assigned their interest in the land to Paxon and Pearson, who, having failed in business, for a valuable consideration assigned by an instrument in writing their "right and claim" to the land (describing it) to Nicholas Longworth. Longworth thereafter paid the government the balance of the purchase money, but the original certificate to Harrison and Beaman had been assigned to Paxon and Pearson, and there was not in the land office any evidence of Longworth's purchase, so that the patent was issued to Paxon and Pearson instead of Longworth. Bell and Kiger in 1852 by virtue of deeds from some of the heirs of Paxon, executed in 1851, entered upon a part of the cleared land and sought to hold it by force. In 1822 Longworth had appointed an agent to take charge of the land, who was shown to have lived near to or upon the land and to have caused portions of it to be cleared and fenced, cut timber from it and prevented others from doing so, and exercised other acts of control over the real estate, which was mostly wooded land, and part of it had not been enclosed. Prior to the litigation Longworth had conveyed an undivided one-half of the land to Miles. On this state of facts in considering the question of the right of Longworth and Miles to hold possession of all the land as against Bell and Kiger, the court said: "Longworth and Miles were un-

doubtedly in possession of some portion of the quarter-section upon which Bell and Kiger made entry; were they of all? * * * It will be appropriate here, then, to institute the inquiry, whether Longworth went into possession under color of title; for if he did, his possession would extend to the whole quarter-section, under the assignment from Paxon and Pearson; and should we so conclude, it will be unnecessary for us to decide the other point, as to whether such acts were performed—such a possession taken as would embrace the whole tract, regarding Longworth as a mere intruder, though, we will remark, that such is the inclination of our opinion. What, then, in a question of adverse possession, constitutes color of title? It was held in some of the earlier cases in New York, and has been in cases following those elsewhere, that color of title was that which appeared *prima facie* a good, while it was in fact a defective, title. But this doctrine is without reason, and is being abandoned. When a party is in possession of land, claiming an adverse title, the question must always arise, to what extent does his claim reach, what lands does his claim of title cover? And where there is nothing but naked possession to evidence it, his title must, from necessity, be limited to the lands over which he has exercised a visible authority, known to others, as owner; to those, in short, from which he has excluded the former owner and others. A man can not go, solitary and alone, to the prairies or forests of the west, set himself down in the middle thereof, and claim that he possesses all, to an undefined extent, not then actually possessed by some one else. He must be limited to that portion over which he exercises palpable and continuous acts of ownership, as being the quantity which he claims as his

own, there being no other evidence, in such case, to enable us to determine the quantity. But where a party is in possession under and pursuant to a state of facts which, of themselves, show the character and extent of his entry and claim, the case is entirely different; and such facts, whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and extent of the claim, and no colorable title does more; for such title alone does not give right; and possession under such facts as above indicated would be constructive notice, on general principles of law, to all the world, of the character of the claim of title. Hence, it has been decided that possession, under a 'sale or gift of land by parol', is under color of title. *Sumner v. Stevens* 6 Met. 337.—Angell on Limitations, 3 Ed., p. 503, and cases cited. To the same effect, *Fain v. Garthwright*, 5 Georgia R., cited in note on page 504, Angell, *supra*. So, under an assigned land-office certificate, transferred in this state in 1817; *Holcroft, et al. v. Hunter*, 3 Blackf. 147; a case somewhat similar to the present. Under these decisions, it is perfectly clear that Longworth went into possession under color of title, and that his possession extended to the whole quarter. The assignment, in this case, from Paxon and Pearson, whether valid or not, was doubtless believed to be so. It was under it that Longworth entered. It shows his entry to have been in good faith, on claim of right, and defines the exact extent, the exact boundaries claimed to; and his possession, under the claim, having been continuous for more than twenty years, has perfected his title to the whole quarter."

Appellants contend that because the court in the case from which we have just quoted indicates that it inclined to the view that the evidence was

sufficient to show actual possession of the whole tract, and that, if necessary to a decision of the case it might so hold, we can not consider the case as an authority on color of title. But, we are compelled to hold the contrary of this view, for the reason that the court expressly states that it is unnecessary to decide the point of actual possession of the whole tract and decides that Longworth was in possession under color of title and that a "party in possession under and in pursuance of a state of facts which of themselves show the character and extent of his entry and claim * * * perform sufficiently the office of color of title * * * and no colorable title does more * * *. Hence * * * possession under a sale or gift of land by parol is under color of title."

The doctrine of this case was approved in *Vancleave v. Milliken*, *supra*, though there was in that case a written instrument. In *Wilson v. Campbell*, *supra*, the claimant was in possession of land under a parol agreement and his title was sustained, but the language of the case is not clear as to whether the court decided the case on the theory of actual possession of the whole tract or by reason of color of title, for it is said, "but the adverse possession under claim and color of right gave him a complete and perfect title." There are cases in Indiana where color of title was given by written instrument, but they are not in point here and any expressions incidentally used in connection with a discussion of color of title so shown in no sense overrule or modify the clear and positive decision in the case of *Bell v. Longworth*, *supra*, which has not been overruled or modified in any sense and is the law in this State on the question decided.

In *Taylor v. Buckner*, *supra*, the Supreme Court

of Kentucky said: (p. 356) "And if the possession creates a bar to any extent, we have no doubt it must be so considered for the whole of the land now in contest. For, although Buckner is not proven to have had any written evidence of title when he entered upon the land, and although he may not have been invested with a regular authority from Stephens to enter, yet, as he is proven to have entered after ascertaining the boundary of Stephens, claiming under him, he must, upon the principle which has invariably governed this court, have gained the possession according to the boundary of Stephens; and as that boundary includes all of the land in contest, the court below decided correctly, upon the facts assumed, in instructing the jury to find for the appellee." In *M'Call v. Neely*, *supra*, the court, in speaking of color of title, said: "The words do not necessarily import the accompaniment of the usual documentary evidences; for though one entering by a title depending on a void deed, would certainly be in by color of title, it would be strange if another entering under an erroneous belief that he is the legitimate heir of the person last seized, should be deemed otherwise: and it would be stranger still if his alienee were deemed to have more color of title than he had himself. To give color of title, therefore, would seem not to require the aid of a written conveyance, or a recovery by process and judgment, for the latter would require it to be the better title. I would say that an entry is by color of title where it is made under a *bona fide* and not pretended claim to a title existing in another. It is impossible to say therefore that a disseisor claiming to be the true owner of a survey, as he may in fact be without being named in the warrant, does not enter by color

of title." In *Brown v. Norvell*, *supra*, the court in disposing of a case involving a parol gift of land said: "But the proof shows that Earle intended to give and did give her the whole tract; and her possession, being referable to the gift extends to the limits of the boundaries of the land so given her." In *Lebanon Min. Co. v. Roger* (1884), 8 Colo. 34, 5 Pac. 661, it is said: "It is the better doctrine that both color and claim of title may exist without any instrument provided such claim or color be in good faith; in the absence of writings there must be some visible act, sign or indication showing the extent of the boundaries of the land claimed."

We have yet to determine whether there is any evidence to support the inference or finding that appellee was in actual possession of all the

23. land described in her amended complaint and indicated by the boundaries to which she testified. The question of such possession was an issuable fact in the case and the verdict of the jury is a finding in her favor on that issue, and must be sustained if the evidence warrants such inference. The lake was the boundary on the north and the river on the south and east. The section line, along which there is evidence to show the trees were blazed at appellee's suggestion in 1876, was the west boundary line. The character of the land, the use made of it and the extent and character of appellee's possession are shown by our statement of the evidence and need not be repeated. It

has been held in this State, and the rule
24. seems to be generally recognized and followed, that the character of the real estate is of controlling influence in determining what acts of ownership, use and occupancy, will suffice to show actual possession of the whole tract claimed. If

the possession and other acts of ownership are such as are reasonably adapted to, and in keeping with, the beneficial use that may be reasonably made of such lands, and such as are usually practiced by owners of similar lands in that vicinity at the time in question, and such possession and acts of ownership are exercised in disregard of all conflicting claims without asking permission of any one, they are sufficient to warrant the inference of actual possession of the whole tract to which such acts relate. *Moore v. Hinkle* (1898), 151 Ind. 343, 345, 50 N. E. 822; *Worthley v. Burbanks, supra*; *Dyer v. Eldridge* (1894), 136 Ind. 654, 661, 36 N. E. 522; *Cutsinger v. Ballard* (1888), 115 Ind. 93, 97, 36 N. E. 522; *Collett v. Board, etc.* (1889), 119 Ind. 27, 34, 21 N. E. 329, 4 L. R. A. 321; *Tolley v. Thomas* (1910), 46 Ind. App. 559, 564, 93 N. E. 181; *Bell v. Longworth, supra*; *L. Hommedien v. Cincinnati, etc., R. Co.* (1889), 120 Ind. 435, 439; *McBeth v. Wetnight, supra*; *Rennert v. Shirk* (1904), 163 Ind. 542, 548, 72 N. E. 546; *Rothschild v. Leonhard* (1904), 33 Ind. App. 452, 461, 71 N. E. 673; 1 R. C. L. p. 717. The adverse possession which affects the right of the true owner is that which exists and appears on the land itself,

25. and where the occupancy is such as to indicate ownership, and is such that upon inquiry by the real owner he could obtain information of the occupant's claim of title, and the character and extent of his possession, it is sufficient. *Dyer v. Eldridge, supra*; *Worthley v. Burbanks, supra*; *Cutsinger v. Ballard, supra*; *Roots v. Beck* (1887), 109 Ind. 472, 475, 9 N. E. 698; *Tennessee, etc., R. Co. v. Linn, supra*.

In *Worthley v. Burbanks, supra*, 540, the Supreme Court considered lands of much the same nature and character as those in controversy here, and said:

"It is manifest that there can be no absolutely unvarying rule with reference to every class of real estate, and that the required occupancy of or dominion over a section of desert lands, or of a mining camp, a non-navigable lake, a prairie, a forest, a fertile farm in a high state of cultivation, or a town lot would not answer as to a lot in the business center of a populous and thrifty city. As said in *Ewing v. Burnet*, 11 Peters, 41: 'So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases.' And, as said in the early case of *Robison v. Swett*, 3 Me. 316, where 'lands being wild and uncultivated, the jury were not to expect the same evidence of occupancy which a cultivated farm would present to them.' * * * 'The kind of possession which will be sufficient must depend largely upon the character of the land, the locality, and the purposes to which it can be put. * * * And where the land is so situated as not to admit of any permanent useful improvement, neither residence, cultivation, nor actual occupation are necessary where the continued claim to the premises is evidenced by notorious acts of ownership, such as a person would not exercise over lands which he did not own.'" In *Tolley v. Thomas*, *supra*, 564, this court said: "From what is thus said we must infer actual possession is such possession as is consistent with the character of the land in question, its locality and its suitable uses. The facts disclosed by this answer show that the subject-matter of this action, until about the year 1890, was wild, marsh land, and for most of the time under water, then and now unfit for cultivation or human habitation. Appellee

asserted every possible act of ownership, and assumed such dominion as the quality of the land would permit, to the exclusion of all others, and put it to every use to which it was adapted, and that, too, without asking permission, and in disregard of all other conflicting claims. * * * The sufficiency of the answer is supported by" (citing authorities). In *Dyer v. Eldridge, supra* (p. 658), the Supreme Court said: "Actual possession of lands under a claim of title is sufficient notice of such claim to put others upon inquiry as to the extent and nature of the claim."

Considering the character of the land and the beneficial use to which it might reasonably have been put during the twenty years from 1876 to

26. 1896, we hold that there is evidence from which the jury might reasonably have found that appellee had actual, exclusive possession of all the land described in her amended complaint, and since the jury so found we can not disturb the verdict on the weight of the evidence. From the foregoing propositions we conclude: (1) That appellee in good faith took and held uninterrupted possession of the land in controversy for over twenty years under color of title shown by the state of facts under which she took and held such possession; (2) that the deed placed in appellee's possession by her alleged donor, though not purporting to convey title to her, when considered in connection with the gift to, and possession by, appellee, of the real estate described in such deed, was sufficient to give color of title to appellee as to all the real estate described therein, and of which she took and continued to hold adverse possession; (3) that the evidence is sufficient to warrant the inference of actual, continuous, hostile possession of all the land in controversy for over twenty years

from 1876. From these conclusions, it follows that the bar of the statute became complete in 1896 in favor of appellee as against all claimants of the land in controversy either on the theory that she has color of title, or independent of the question of color of title, that she had such actual, visible, hostile and uninterrupted possession, under claim of ownership as to perfect her title and to render immaterial the acts or claims of other persons subsequent to 1896. *Burr v. Smith* (1899), 152 Ind. 469, 472, 53 N. E. 469; *Roots v. Beck*, *supra*; *State v. Portsmouth Savings Bank* (1886), 106 Ind. 435, 461, 7 N. E. 379; *Holcroft v. Hunter* (1832), 3 Blackf. 147, 152; *Rennert v. Shirk*, *supra*; *Jackson v. Creek* (1911), 47 Ind. App. 541, 555, 94 N. E. 416; *May v. Dobbins* (1906), 166 Ind. 331, 333, 77 N. E. 353; *Dyer v. Eldridge*, *supra*, 660; *Puterbaugh v. Puterbaugh* (1892), 131 Ind. 288, 294 30 N. E. 519.

Appellants contend that appellee was not a competent witness to testify to the alleged transaction with Mr. Bingham in regard to the gift and possession of the land and the contents

27. of the deed appellee claims to have been placed in her possession by him, and also in regard to her subsequent possession and use of the land. The ground of the objection was that appellant Mathieu claimed an interest in the real estate in controversy by inheritance from her parents, Mr. and Mrs. Beaubien, and that one of her parents from whom she inherited did not die until 1904; that under §522 Burns 1914, §499 R. S. 1881, appellee was incompetent to testify to anything relating to or affecting the land that occurred prior to 1904. The section of the statute is as follows: "In all suits by or against heirs or devisees, founded on a contract with or demand against the

ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor." In order to render appellee incompetent to testify in her own behalf over the objection of appellant Mathieu it must appear not only that the suit was against Mrs. Mathieu, as heir of a deceased former owner of the land who was alive at the time the transactions occurred which were sought to be given in evidence, but that the suit was "*founded on a contract with or demand against the ancestor, to obtain title to, or possession of, property * * * of, or in right of such ancestor.*" The phrase "or to affect the same in any manner" refers to the property mentioned in the statute and does not bring in a new class of cases not "*founded on a contract with or demand against the ancestor.*" The case at bar is not founded on any contract with or demand against the deceased parents of Mrs. Mathieu, and appellee was not incompetent to testify for the reasons aforesaid. *Taylor v. Duesterberg* (1887), 109 Ind. 165, 171, 9 N. E. 907; *Durham v. Shannon* (1888), 116 Ind. 403, 405, 19 N. E. 190, 9 Am. St. 860; *Snyder v. Frank* (1913) 53 Ind. App. 301, 308, 101 N. E. 684; *Waltz v. Waltz* (1882), 84 Ind. 403, 409; *Cross v. Herr* (1884), 96 Ind. 96, 99; *Louisville, etc., R. Co. v. Thompson* (1886), 107 Ind. 442, 456, 8 N. E. 18, 9 N. E. 357; 57 Am. Rep. 120; *Cincinnati, etc., R. Co. v. Cregor* (1898), 150 Ind. 625, 630, 50 N. E. 760 *Sloan v. Sloan* (1898), 21 Ind. App. 315, 319, 52 N. E. 413; *Michigan Trust Co. v. Probasco* (1902), 29 Ind. App. 109, 123; 63 N. E. 255; *Zimmerman v. Beatson* (1907), 39 Ind. App. 664, 667, 79 N. E.

518, 80 N. E. 165; *Goodwin v. Bentley* (1903), 30 Ind. App. 477, 483, 66 N. E. 496.

There are some expressions in the decided cases dealing with §§521, 522 *Burns* 1914, §§498, 499 R. S. 1881, which may indicate a different rule from what we have declared, but such expressions or holdings, if they amount to such, are out of harmony with the prevailing weight of authority, as shown by the decisions of both our courts of last resort, and as indicated by this court in the recent case of *Snyder v. Frank*, *supra*. The general purpose of both said sections is identical and was expressed by Mitchell, J., in *Taylor v. Deusterberg*, *supra*, 171, as follows: "A contract or matter in which the decedent in his lifetime never had any concern or interest, can not be so involved in a suit by his personal representative as to preclude the parties interested in the transaction, although it may come collaterally in question, from upholding it by their own testimony. If it were otherwise, the death of a stranger, who presumably could not have testified concerning the matter if living, would close the mouths of the only persons interested in the contract when it was made. The true spirit of the statute seems to be, that when a party to a subject-matter or contract, in action, is dead, and his rights in the thing or contract have passed to another who represents him in the action or proceeding which involves such contract or subject-matter, to which the deceased was a party, the surviving party to that subject shall not testify to matters occurring during the lifetime of the decedent." In *Sullivan v. Sullivan* (1893), 6 Ind. App. 65, 69, 32 N. E. 1132, in speaking of §522, *supra*, this court said: "That section contemplates only suits between heirs or by or against such founded on a demand against the ancestor to obtain title to or possession of his prop-

erty or to affect it in any manner." Our conclusion on this subject makes it unnecessary

28. to consider at length the propositions that appellant Mathieu only claimed to own a small undivided interest by inheritance and that if her objection should have been sustained, if she were the only party to the suit the evidence could not be properly excluded as against her coappellants on the grounds urged by her, since they did not claim to own the property by inheritance. The evidence should in such instance be admitted and if not competent against some of the defendants, it should be properly limited by the court by instructions to the jury. *Benjamin v. McElwaine-Richards Co.*, *supra*; *Turpie v. Lowe* (1902), 158 Ind. 314, 325, 62 N. E. 484, 92 Am. St. 310; *Thistlewaite v. Thistlewaite*, *supra*.

Most of the evidence objected to which was given by appellee and members of her family, and by other witnesses, related to declarations made

29. and acts performed while in possession of the land, relating to the character and extent of appellee's possession and the use and control of the land by her and such members of her family under her directions, and were competent as a part of the *res gestae* of the continuing act of possession, to qualify, explain and characterize such possession. *Creighton v. Hoppis* (1885), 99 Ind. 369, 374; *Welker v. Appelman* (1909), 44 Ind. App. 699, 711, 90 N. E. 35; *Gifford v. Gifford* (1915), 58 Ind. App. 665, 107 N. E. 308, 312.

The questions relating to the instructions need not be considered in detail. Most of the questions suggested are answered by our decision of the questions already decided. The instructions given, considered as a whole, fairly and accurately in-

formed the jury as to the law applicable to the case under the pleadings and evidence.

Some question is suggested as to the jurisdiction of the Laporte Superior Court over a portion of the land in controversy on the ground that the amended complaint filed in the Laporte

30. Superior Court included some land not described in the original complaint filed in the Lake Circuit Court. The verdict returned in the Lake Circuit Court before the change of venue was taken contained a description identical with that in the amended complaint. The original complaint is not set out in the transcript from the Lake Circuit Court. The filing of the amended complaint was not the commencement of a new or different suit, nor is it even claimed that it states a different cause of action from that stated in the original complaint. It does not appear that appellants were prejudiced, misled or deprived of any

31. right or defense by the amendment, which was fully authorized both by statute and decisions. §403 Burns 1914, §394 R. S. 1881. *Hillyard v. Robinson* (1913), 53 Ind. App. 107, 110, 101 N. E. 341, and cases cited. The amendment of the description, if inaccurate or incomplete as to all the real estate involved in the controversy, was legitimate and no error was committed in permitting it to be made. Furthermore the description in the original complaint, which was offered in evidence, though somewhat less definite, may be reasonably construed to include the identical land described in the amended complaint, and the description in the amended complaint as only a more definite description of the same real estate.

The contention can not be upheld that the verdict is not sustained by sufficient evidence on the ground that it conclusively shows that the possession was

in appellee's husband and not in her and that

32. appellant's predecessors were in actual peaceable possession in 1876, when appellee moved on the land. The complaint avers that the possession was taken and held by appellee and there is evidence tending to prove such allegation. The evidence also tends to show that from the first she took possession as owner and openly, by words and acts, asserted her title against all the world; that she was continually in open, hostile possession, and that inquiry or observation by the real owners of the legal title would have given them knowledge of the character of her possession and her claim of title. A number of disinterested witnesses gave evidence showing her possession, use and claim of ownership, from 1876 to the time of the trial, of the identical land described in the amended complaint. In addition to the testimony already set out appellee testified that soon after Mr. Bingham left: "I told Mr. Dutcher the land was given to me and I proposed to move on it and live on it and I was going to do so." The evidence shows that in a very short time the west line was blazed, the cabin was built, and she and her husband moved on the land and continued to reside there for more than twenty years claiming that she owned the land. The fact that her husband drove trespassers from the land does not necessarily show he was claiming to own it instead of his wife. She testified that she directed him to keep trespassers off the land, and other witnesses testified to his driving trappers from the land, asserting at the time that "this is our land." This and other testimony of similar import may reasonably be construed to support appellee's claim of ownership and adverse possession.

The fact that she was a married woman did not preclude her from taking and holding the ex-

clusive possession of the land. Her marital
33. relations were proper to be considered along
with the other evidence but there was ample
evidence from which the jury might properly
find that possession was taken by appellee under
claim of ownership, and that she continued to so
hold and to occupy the land for over twenty years.
Clark v. Gilbert (1872), 39 Conn. 94.

We have in effect, if not in detail, passed upon
all the numerous questions presented by the briefs.

There is no harmful error shown in the
34 admission or exclusion of evidence or in the
giving or refusal of instructions. The evi-
dence is conflicting on many important proposi-
tions, but there is no failure of evidence. Under
our rules of appellate procedure, this court can not
weigh or ignore the evidence. The jury has a wide
latitude in drawing inferences from evidence, and
where any reasonable inference has been drawn
therefrom it is conclusive in this court. There
is ample evidence from which the jury may reason-
ably have found every essential fact to support the
verdict. The case seems to have been fairly and
impartially tried and no reversible error is shown.

Judgment affirmed.

Shea, C. J., Ibach, P. J., Caldwell, Moran and
Hottel, JJ., concur.

NOTE.—Reported in 109 N. E. 456. Color of title, what constitutes, in order to sustain claim of adverse possession, see 14 Am. Dec. 580; 88 Am. St. 701; also, 1 Cyc 1082, 1085. Amendment of pleading respecting description of land, see 14 Ann. Cas. 455.

CITY OF INDIANAPOLIS v. LAMKIN.

[No. 9,032. Filed May 22, 1916.]

1. MUNICIPAL CORPORATIONS.—*City Clerk.—Duties.*—Under the provisions of §§8652, 8653 Burns 1914, setting forth the official duties of a city clerk and providing that he must keep a record of the proceedings of the common council, it is held that preparing an index to such record is a duty of the city clerk incidental to his official duties as set forth in the statute; and this duty must be performed by him without special or extra compensation. p. 129.
2. PUBLIC POLICY.—*Official Duties.*—Public policy requires that courts should not indulge in refinements too nicely drawn in construing statutes prescribing official duties to the end that a particular service may be classed as extraofficial. p. 129.
3. MUNICIPAL CORPORATIONS.—*City Clerk.—Duties.*—General Ordinance No. 90 of 1911, city of Indianapolis, defining duties of city clerk, construed and held to require the clerk, as an official duty, to keep a record of the proceedings of the common council and to prepare an index to the volumes of such proceedings, for which he is not entitled to special or extra compensation. p. 131.

From Marion Superior Court; *Charles J. Orbison*, Judge.

Action by James W. Lamkin against City of Indianapolis. From a judgment for plaintiff, the defendant appeals. *Reversed.*

William A. Pickens, Fred E. Barrett, Paul G. Davis and Russel J. Ryan, for appellant.

Caleb S. Denny and George L. Denny, for appellee.

CALDWELL, J.—Appellee brought this action to recover compensation for services alleged to have been performed by him in preparing an index of the proceedings of the common council of appellant city for the year 1913. A trial by the court resulted in a judgment for appellee for \$300. The evidence at the trial consisted of an agreed statement of facts. If such facts considered as evidence are not sufficient to sustain the decision, this cause must be reversed; otherwise affirmed.

The agreed facts to the extent material are in substance as follows: For the years 1910, 1911, 1912 and 1913, Edward A. Ramsey was city clerk of appellant city; for fifteen years prior to 1910, the city clerk of appellant city was employed by the city each year to prepare an index of the proceedings of the common council, and the city paid him \$300 each year for such services. In 1911, the common council by General Ordinance No. 90 adopted a rule specifying it to be the duty of the city clerk to make and keep an accurate minute and journal of the proceedings of the common council as required by the statute (§8652 Burns 1914, Acts 1905 p. 219, §50), and providing also that he should have the minutes of such proceedings printed after each meeting for the use of members of the council, and that copies thereof should be preserved on file, to be bound at the end of the year, with a proper index thereto, as the official journal of the common council. Under direction of the common council, Ramsey prepared such an index for each of the years 1910, 1911 and 1912, which having been printed was included in the bound volume for each of said years, and for his services in so doing appellant paid him \$300 for each year. The minutes of the proceedings of 1913 were voluminous. Public necessity and convenience required that a suitable index be prepared, printed and bound with the volume for said year. In August, 1913, Ramsey called the attention of the city controller to such necessity, and suggested that he recommend an appropriation of \$300 as a fund for indexing the council proceedings of 1913. December 1, 1913, the common council regularly passed Appropriation Ordinance No. 51, to the effect that thereby the sum of \$300 was appropriated for purposes aforesaid; that

appellee was thereby employed to do the work; and that the city controller was thereby directed to draw a proper warrant therefor in favor of appellee on the completion of the work. The mayor of the city signed and approved the ordinance December 9, 1913. Some doubt having arisen respecting the validity of the ordinance, the city controller submitted the question to the city attorney, who thereupon rendered an opinion to the effect that the ordinance was invalid to the extent that it designated a particular person to receive the benefit thereof. Thereupon both Ramsey and appellee proceeded to prepare the index, each claiming that he had been employed by the city to that end. In view of the situation, the city controller notified both Ramsey and appellee by letter that he would refer the controversy to the city attorney and be guided by his opinion in making payment for such services. Ramsey, having completed his manuscript of the index, delivered it to the printing company which was under contract with the city to print and bind such proceedings of the council. The printing company, acting under instructions received from the city controller, used Ramsey's manuscript in preparing the bound volume for 1913. Appellee also delivered to the printing company a manuscript prepared by him, but it was not used. The manuscript of the index prepared by appellee and also that prepared by Ramsey were proper and accurate indexes, and the labor in preparing them was in each case reasonably worth \$300. Appellee and Ramsey each filed with the proper city officers a claim for services in the sum of \$300. Each claim was disallowed. Appellee and Ramsey each thereupon brought an action against the city to recover the amount of their respective claims. The actions were tried by the court at the same time

on the agreed statement of facts, the substance of which we have set out above. The decision of the court was against Ramsey in his action and in favor of appellee in the action brought by him. As indicated, this appeal involves the latter action.

In support of its appeal, the city states the following proposition: "The common council of a city in this State has no power or authority to appropriate money to pay others for services which particular officials and employes of the city are to do by law, and an ordinance which appropriates money for such a purpose is invalid." In support of such proposition appellant cites the following decisions which seem to sustain it: *Mitchell v. Wiles* (1877), 59 Ind. 364; *City of Ft. Wayne v. Lehr* (1882), 88 Ind. 62; *Rothrock v. Carr* (1876), 55 Ind. 334; *Driftwood Co. v. Bartholomew Co.* (1880), 72 Ind. 226. To such decisions the following may be added: *City of Richmond v. Dickerson* (1900), 155 Ind. 345, 58 N. E. 260; *State, ex rel. v. Goldthait* (1908), 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737. Appellee fully concedes that said proposition is sound, and that if it was the duty of the city clerk to prepare such index, this cause must be reversed.

It is provided by statute that "The city clerk of every city shall be the clerk of the common council. * * * He shall keep the records of the proceedings of such council, and have charge of all the papers relating to its business; shall prepare and keep an ordinance book. * * * Shall have charge of all documents and books, the keeping of which shall be entrusted to him by statute or ordinance; * * * and shall perform all other duties prescribed by law or incident to his office." §8683 Burns 1914, Acts 1905 p. 219, §81. There is a further provision that it shall be

his duty to make and keep an accurate minute and journal of the proceedings of the council, and "to perform all other duties required by such office." §8652 Burns 1914, *supra*. It is further provided that in cities of the first class, a city clerk shall receive a salary of \$3000 per year, "and that such clerk shall not receive any other compensation, fee or perquisite whatever except for furnishing certified copies", etc. §8683 Burns 1914, *supra*. From such statutory provisions, it appears that the city clerk is required to reduce to writing, in the form of a minute or journal, the proceedings

1. of the common council, and also to perform all other duties incident to his office; and in addition to certain duties specifically mentioned, he must perform all other duties required by such office. If a certain service must be classed as an official duty, then the parties agree that for performing such service extra compensation can not legally be paid the incumbent of the office, and, to that end, third persons can not lawfully be employed or paid. It is not an easy problem, however, under all circumstances to determine fully what services performed in connection with a public office must be classed as "official" as the term is here used. It is plain that all duties that come within the specific or general provisions of the statute as above quoted must be classed as official. It would seem also that public policy requires that courts should not indulge in

2. refinements too nicely drawn in the construction of statutes prescribing official duties, to the end that a particular service may be classed as nonofficial or extraofficial. On this subject, the following language is used in *Evans v. Inhabitants of Trenton* (1853), 24 N. J. L. 764, 767: "The

statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse."

The minutes of the proceedings of the council are required to be entered and kept, and the papers and files pertaining to its business are required to be preserved, among other reasons, in order that the city officials and the public may be readily advised respecting the transactions of that particular department of the city government. It would seem to follow that a requirement that a minute or journal of the proceedings be made a matter of record, and that such papers and files be placed in a certain custody, should reasonably be held to include a further or incidental requirement that the work be done in such manner as to be effective. To be effective, the minutes, papers and files must be placed in such condition that the city officials and the public may readily and conveniently acquire the desired information. We are advised by the agreed statement of facts that public necessity and convenience required the preparation of the index involved here. The city clerk is expressly charged with the duty of making and keeping an accurate minute of the proceedings of the council, and he is required also to perform all other duties incident to his office. When he has merely written up the proceedings of a meeting or of a number of meetings, something further remains to be done in order that such work may be effective. Public necessity and convenience require that his work be supplemented. We do not believe that the clerk

has performed his full official duty when public necessity requires that something further be done in order that what he has done, from day to day, may serve its intended purpose. The something further required to be done is the preparation of an index. By reason of his familiarity with the affairs of his office, he is certainly more competent to prepare such an index than any other person of equal capacity. Preparing such index and causing it to be printed and bound with the volume for the year, being a work which public necessity requires to be done at stated intervals, in order that the work done from day to day may be effective, it follows in our judgment that the preparation of such index is a duty incident to the office, and therefore an official duty.

An examination of General Ordinance No. 90, enacted in 1911, confirms us in such conclusion. "Duties of city clerk" is the subject of such ordinance, as gathered from its provisions. It

3. specifically requires that the clerk shall keep an accurate journal of the proceedings of the council, and that he shall have such proceedings printed after each meeting. There are further provisions that one of such printed copies shall be presented to each member of the council within ten days after the particular meeting, and that other copies shall be kept on file to be bound at the end of the year with the proper index thereto. Such ordinance deals with clerical work, and with the work of a printer and binder. To our minds, the ordinance is not reasonably susceptible of any other construction than that by its provisions the city clerk is required to do such clerical work and to supervise the work of the printer and binder. It is certainly a reasonable construction that the person charged with the duty of having the pro-

ceedings printed is the person required to present a printed copy thereof to each member of the council, and that the person designated by law as the custodian of the papers and files pertaining to the business of the council, is the official required to keep said printed copies of the proceedings to be bound. The sole remaining clerical duty is the making of the index. Keeping in mind the subject of the ordinance, and that all other clerical work therein designated must be classed as official duties of the clerk, and his natural fitness for the work of preparing the index, it is certainly a reasonable construction of the ordinance that such work must also be classed among the official duties of the clerk. It follows that this cause must be reversed.

The judgment is reversed, with instructions to the court to sustain the motion for a new trial.

NOTE.—Reported in 112 N. E. 833. See under (1) 28 Cyc 452.

MURRAY ET AL. v. MURRAY ET AL.

[No. 8,936. Filed May 22, 1916.]

1. *APPEAL.—Partition by Parol.—Conflict of Evidence.*—Where there is a conflict in the oral evidence as to the effect and extent of a parol agreement for partition the decision of the trial court upon such question is final, and it is not reviewable upon appeal. p. 142.
2. *PARTITION.—Parol.—Effect.*—A parol agreement for the partition of lands will be upheld and enforced where such agreement has been executed by the parties thereto taking possession of their respective severed portions. p. 143.
3. *DEEDS.—Merger of Oral Negotiations.*—As a general rule all oral negotiations leading up to the execution of the deed are merged therein. p. 144.
4. *DEEDS.—Merger.*—Where it is sought to have an agreement as to partition merged into subsequent deeds, the doctrine of "merger" can have no application where the estates created by the deeds are not equal to, or coextensive with, the estates created by the partition. p. 144.

Murray v. Murray—62 Ind. App. 132.

5. **ESTATES.—***Merger of Legal and Equitable Titles.*—The intention of the party, expressed or implied, is the true test of whether there has been a merger, and where such merger, in the light of all the circumstances, would be disadvantageous to him, then the merger of an equitable estate with a legal estate will not be presumed. p. 144.
6. **ESTOPPEL.—***By Deed.*—A person can be estopped by deed only when such deed sets forth the precise fact upon which such an estoppel is to operate. p. 145.
7. **ESTOPPEL.—***By Quitclaim Deed.*—No estoppel arises either from making or accepting a quitclaim deed, and both the grantor and the grantee may prove that no interest or estate was transmitted thereby. p. 145.
8. **ESTOPPEL.—***By Deed.*—Where the defendants derived their title through a deed to their father and where there is no showing of fraud or mistake, they are estopped by that deed from claiming, under a partition proceeding prior thereto, any larger estate or interest than that expressed in their deed. p. 147.
9. **ESTATES.—***Merger.*—Where defendants are claiming under an alleged partition made prior to the deed under which they derived their title and there was no evidence of a subsequent partition or a ratification of the alleged prior partition, a finding that the defendants take a larger estate than that described in their deed is erroneous. p. 148.

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Action for partition by Charles F. Murray et al. against Robert H. Murray et al. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Shirts & Fertig, for appellants.

J. F. Neal and N. C. Neal, for appellees.

HOTTEL, P. J.—Charles F. Murray, hereinafter referred to as appellant, his wife joining him, brought suit in the court below for partition of 61 acres of land in Hamilton county, viz.: The north-east quarter of the northeast quarter of section 1, township 17 north, range 6 east (hereinafter referred to as the south 40 acres), and the southeast quarter of the southeast quarter of section 36, same township and range (hereinafter referred to as the north 40 acres), except 19 acres off the north side thereof. In his complaint appellant alleges that

he is the owner of an undivided one-half of said real estate; that appellee Calvin G. Murray is the owner of an undivided one-sixth thereof, and that the other appellees are the owners of the remaining two-sixths in interests unknown to appellant. Ferdinand Murray and Mary Fern Lockwood filed an answer and a cross-complaint, in each of which they allege, among other things, that they and their coappellee Calvin G. Murray and appellant are each the owner of an undivided one-fourth in said south 40-acre tract; that about nineteen years previous appellant, his brother Calvin and their mother Maria owned all the real estate described in the complaint as tenants in common, and that they then entered into a mutual agreement to partition the same and for that purpose selected arbitrators, who set off to Calvin G., nineteen acres off the north side of the north 40 acres; to appellant, Charles F., the 21 acres remaining of the north 40 acres; and to said Maria the south 40 acres; that afterwards, on the.....day of....., deeds were made to Calvin G. in confirmation of his title to the 19 acres, and immediately upon said division Charles F. and Maria accepted the partition so made, and each of them respectively entered into the full and exclusive possession of the portions thereof so assigned to them, and have since continued in exclusive possession thereof; that since such partition appellant exercised control and dominion over the 21 acres as sole owner thereof, paid the taxes thereon, received all the rents and profits therefrom and made improvements thereon; that since such partition Maria, until her death, exercised full control over the south 40-acre tract, receiving the entire rents and profits thereof; and all of said tenants in common fully accepted and acquiesced in the partition so made; that appellees, and each of

them, are ready and willing to execute any conveyance that may be necessary to confirm the title to the said Charles F. in the 21 acres; that by reason of the facts aforesaid, the 21-acre tract is not a proper subject of partition in this action.

Appellant answered the cross-complaint and replied to the answer by general denial. The other defendants to the complaint and cross-complaint were defaulted. There was a trial by the court and a finding that appellant is the owner in fee of the 21-acre tract, and that he, Calvin and appellees are the owners as tenants in common of the south 40-acre tract in the several proportions set out in the answer and cross-complaint and that the same should be partitioned. Judgment was rendered in accord with the finding. Appellant filed a motion for new trial which was overruled; commissioners were appointed to make partition and they reported the land indivisible, which report was confirmed and the land was ordered sold by a commissioner.

The ruling on the motion for new trial is relied on for reversal. The only grounds of this motion are: (1) The decision of the court is not sustained by sufficient evidence, and (2) it is contrary to law. It appears from the evidence and the facts agreed on at the trial that prior to 1886 Thompson Murray died seized of both 40-acre tracts abovedescribed, and a 46-acre tract adjoining on the west, and that all parties claim title through him. He left surviving him a widow, Maria Murray, and four sons, viz., Robert H., James, Charles F., and Calvin G. Murray, who, where hereinafter referred to by name, will be designated by their respective given names. After his father's death James sold his interest to Robert. It seems to have been understood by the mother and the other children that James intended to sell, not only his present interest

inherited from his father, but also his expectancy in his mother's portion of the father's land and, it having been suggested to the mother that the deed from James to Robert was ineffective to convey such expectancy, the mother, Maria, in March, 1886, executed quitclaim deeds, in which she attempted to convey her one-third interest in her husband's estate to her three sons with a reservation to herself of a life estate therein, viz., she conveyed to Robert one-half of such one-third, and to Charles and Calvin each one-fourth of such one-third, in the entire 126 acres of which her husband died seized. These deeds were recorded September 30, 1886, but as one or more of them was testamentary in character and inoperative they were all afterwards ignored, and thereafter, at the September term, 1886, of the Hamilton Circuit Court, in a partition proceeding to which Maria, Charles, Robert and Calvin were parties, the 46-acre tract, not involved in this suit, was set off to Robert in severalty as and for his share inherited of his father's said land and the share purchased of his brother James, and the land in controversy was set off to Maria, Charles and Calvin, together. This division was confirmed by the court.

In 1894 Robert and his wife executed a warranty deed conveying all his interest in said land to Samuel A. Patterson. On March 23, 1896, shortly after the alleged parol partition referred to in appellee's answer and cross-complaint, Charles and Maria conveyed by deed to Calvin the 19 acres, the tract set off to him by the parol partition. On the same day Calvin and wife conveyed by quitclaim deed the 21 acres and the south 40 acres to Maria and Charles. That is to say, they conveyed the undivided one-twelfth part thereof (describing the 61 acres as above) to Charles, and the

undivided two-twelfths part thereof to Maria. The deed reciting that it was made in connection with another deed of the same date for the purposes of partition. On March 25, 1896, Maria conveyed by deed to Robert the undivided one-half of the two-thirds part in value of the 61 acres, viz., the south 40 acres and the north 40 acres, except the 19 acres set off to Calvin; to Charles the undivided one-fourth of the two-thirds part in value thereof; and to Calvin the remaining one-fourth of the two-thirds part in value thereof. All of the deeds were recorded. In the deed last named Maria reserved to herself a life estate in the lands conveyed. Maria died January 2, 1913.

Robert Murray married Laura B. Patterson, the daughter of Samuel A. Patterson, and the latter by his last will devised to his daughter, Laura B., for and during her natural life, and at her death to her children or their descendants, the undivided 20 acres of the south 40-acre tract (describing it), subject to the life estate therein of Maria Murray. Ferdinand Murray and Mary Fern Lockwood, hereinafter referred to as appellees, are the children of Robert Murray and Laura B. (Patterson) Murray and claim the real estate in controversy under the will of their grandfather, Samuel A. Patterson.

On February 21, 1898, James A. Owen, sheriff of Hamilton county, executed to Samuel Patterson a deed in which it was recited that in 1897 Patterson had recovered a judgment in the circuit court of said county in an action therein against Robert N. Murray and Laura B. Murray for the sum of \$1,213.41 and costs, etc., and a decree for the sale of all the interest, estate, right and title of said Murrays in and to real estate described therein as follows: “* * * and also the undivided one-half (1/2) of the undivided two-thirds (2/3) part

in value (subject to the estate for life of Mariah Murray)" in said 61 acres (the decree describing both 40 acre tracts and excepting therefrom the nineteen acres off the north side of the north 40 acres). The deed then proceeds with the usual recitals of a sheriff's deed and shows that the real estate was offered for sale and was bid in by, and sold to, said Patterson, and that in confirmation of the sale the deed was executed.

It will be observed that Patterson's deed from the sheriff for Robert's interest in said real estate described it as the undivided one-half of the undivided two-thirds of the entire 61 acres, ignoring any partition thereof, if there had been any; while Patterson in his will treated the land as having been partitioned and gives to appellee's mother for life, and to appellees at her death, the undivided 20 acres, etc., being the half of the south 40 acres.

No question is made by appellant as to appellees being the owners of the interest of Robert sold at sheriff's sale, and it is in effect conceded that appellees' title, whatever it may be, came to them through the deed of Maria Murray to Robert H. Murray, the sheriff's deed conveying the real estate of Robert to Patterson, and the latter's will, the only contention in the case being whether appellant is entitled to the 21 acres and an undivided one-fourth in the 40 acres as claimed by appellees and adjudged by the trial court, or whether he is entitled to an undivided one-half in the 61 acres as claimed by appellant.

Appellant admits in effect that there was a verbal agreement of partition between him and Calvin and their mother, but that the agreement was limited to the partition and severance of the 19 acres set off to Calvin, and that there was no understanding or arrangement whereby the remaining

61 acres held by him and his mother should be partitioned or divided between them; but that they continued to hold the 61 acres in common, the mother holding two-thirds and he, one-third; that the only arrangement between them was one as to the division of crops, whereby he took the crops off the 21 acres; the mother, off the 40 acres, both occupying the buildings and paying the taxes according to their undivided interests. It is further contended in effect by appellant that, though in fact there had been such verbal partition between him and his mother, the uncontradicted evidence shows that it was just before the making of the deeds referred to, *supra*, as made in March, 1896; that all oral negotiations, if any, for the partition of the land between appellant and his mother, made prior to, or at the time the 19-acre tract was set off to Calvin, were merged in the deeds afterwards made by the parties whereby they then expressly and respectively conveyed such lands among themselves according to their interests, as they then understood and intended them to be; that such deeds show that partition of the 61 acres, if ever made, was ignored and abandoned, and that by such deeds all parties thereto or those claiming thereunder are estopped from asserting any parol partition other than that recognized by the deed to Calvin of the 19 acres set off to him; and that such parties are estopped from asserting any title or interest in said land different from that expressed in said deeds. It is further insisted by appellant that the title asserted by appellees is a legal title and that they can not recover on proof of an equitable title, citing *Bruce v. Osgood* (1887), 113 Ind. 360, 363, 14 N. E. 563; that a "parol partition, where possession under it has not been held sufficiently long to justify the presumption of a deed,

as a general rule, *confers no legal title*, but either co-tenant can compel the other to convey the legal title in accordance with the terms of the partition, and such conveyance, when made, unless otherwise intended will relate back to the time of the parol partition."

In answer to appellant's contention it is insisted by appellees, in effect, that there is evidence showing that there was in fact a parol partition of the real estate in controversy as set up in their answer and cross-complaint; that the parol partition was fully consummated at the time of the making of the deed in March, 1896, by said Maria to Robert, and prior to the making of said sheriff's deed to Patterson, and prior to the will of Patterson; that these latter instruments should be construed and interpreted in harmony with such partition and not permitted to overthrow or defeat it; that in any event appellant has not pleaded an estoppel by deed; that there is no question of title in issue in the case, and hence that the defense of estoppel by deed can not be considered because it is not pleaded; that if the court should consider that there is a question of title involved and should consider the defense of estoppel that, for the reasons above stated, the certainty required in an estoppel is not manifest from the deeds; that the deeds are not in fact clearly inconsistent with, and antagonistic to, the parol partition; that as against any estoppel resulting from any apparent antagonism between the deeds and the partition under the parol agreement, appellees are entitled to the benefit of an estoppel *in pais*, viz., that appellant and his mother each continued in possession of the respective tracts set off to each, separately farmed the tracts, and took the grain raised thereon continuously up to the death of the mother; that appellant, after the

death of the mother, continued to recognize such partition and accepted and received his portion of the rents of the farm in accord therewith; that on account of such recognition of, acquiescence in, and ratification of, said parol partition, appellant should be bound thereby and estopped from asserting any different title or interest in said land.

As affecting such respective contentions of the parties there is oral evidence in the record showing, or tending to show, that the verbal agreement of partition, under which appellant admits that the 19-acre tract was set off to Calvin, also provided for a partition between appellant and his mother of the remaining 61 acres now sought by appellant to be partitioned; that, pursuant to such agreement, the parties selected to make such partition divided the north 40 acres into two separate tracts of 19 and 21 acres, respectively, leaving the south 40 acres for the mother; that after such division was made Calvin agreed to give appellant his choice of the 19 acres and the 21 acres, and that appellant then in the presence of the parties making such partition selected the 21-acre tract; that continuously thereafter until the mother's death, appellant and the mother took the crops from said respective tracts so separated and set off to them; and that in the year following the death of the mother the crops were likewise divided between appellant and the parties hereto in accord with said partition. On the other hand appellant testified in effect that the agreement made between him, Calvin and the mother was made for the sole purpose of allowing Calvin to have his part set off to him without court expense; that it was never understood or agreed that there was to be any partition between appellant and the mother; that appellant did not select either partitioner, was not present when the parti-

tion was made, and did not select or accept the 21-acre tract as his portion of said land; but that he afterwards agreed to the partition in so far as it set off to Calvin the 19-acre tract; that to carry out and make effective such parol partition the mother and children met at the office of Fertig & Alexander, attorneys at Noblesville, and there gave to such attorneys certain data for the preparation of the deeds mentioned, *supra*, as made in March, 1896; that said attorneys then made a memorandum of the data from which they prepared said deeds, which was turned over to appellant and has since been retained by him, which memorandum was offered in evidence and contains all the data affecting the title and interests of the parties herein to said real estate substantially as above set out and is in exact accord with said several deeds made after the verbal partition, viz., the deeds, *supra*, made in March, 1896.

It will be seen that as to the effect and extent of the parol agreement for partition, and the partition made thereunder, there is a conflict in the oral evidence, and under the well-rec-

1. ognized rules of this court the decision of the trial court upon such question is conclusive on this court. The question, therefore, which we are required to determine is as to the effect of such partition upon the question here involved when considered in connection with the several deeds affecting such question, and especially the deed through which appellees assert title. We deem it unnecessary to go into the question whether the estoppel by deed claimed by appellant should have been pleaded. It is sufficient to say that, as the record comes to us, the evidence is all before the court without objection. The substance of the contents of the deeds was admitted as a part of the

agreed statement of facts, and the only questions which we are asked to determine is whether the evidence is sufficient to sustain the decision of the trial court, and whether such decision is contrary to law.

It is well settled in this State that a parol partition of lands that has been consummated by the severance of the lands and by the respective

2. parties to such agreement taking possession of the respective severed portions set off to them will be upheld and enforced by the courts. The statute of frauds may stand in the way of an enforcement of an unexecuted parol agreement for the partition of lands, but such agreement is enforceable if "it has been so far executed by taking possession, or by the performance of such acts in reliance thereon, as to entitle parties interested to invoke the jurisdiction of a court of equity for specific performance. When the contract has been followed by possession, in conformity with the partition agreed upon, since a court would have enforced an equitable partition without the consent of all the parties, a partition thus effected by agreement will be so far binding as to be enforceable, unless it is infected with fraud. A partition effected by mutual agreement, followed by possession, is the equivalent of a decree in a court of chancery, which does not of itself convey or transfer the title, even after the allotment of the several shares of each of the parties to the proceeding. The transfer of title is a matter distinct from the partition, but the transfer may be compelled by a court of equity." *Bruce v. Osgood*, *supra*; *Gay v. Parpart* (1882), 106 U. S. 679, 1 Sup. Ct. 456, 27 L. Ed. 256; *Buzzell v. Gallagher* (1871), 28 Wis. 678. However, in the instant case, after the partition was made under the verbal agreement, the parties executed deeds which

ignore the partition, except in so far as it set off to Calvin the 19-acre tract, and expressly recognize the joint ownership of the 61 acres between appellant and his mother.

It is true, as appellant contends, that as a rule all oral negotiations leading up to the execution of a contract or deed are merged therein. *C. F.*

3. *Adams Co. v. Helman* (1914), 58 Ind. App. 394, 399, 106 N. E. 733; *O'Brien v. Higley* (1904) 162 Ind. 316, 318, 319, 70 N. E. 242. Assuming, however, as we must under the evidence above indicated, that there had been a fully consummated and executed partition of the 61 acres in question between appellant and the mother at the time of the making of the deeds in question, the doctrine of merger could have no application except on the theory that the equitable title created by such

4. partition was merged in the legal title conveyed by the deeds, and such a merger, viz., of an equitable title in a legal title results only where the two estates are "co-extensive or commensurate, or more accurately, the legal estate must be equally extensive with or more extensive than the equitable estate, for the equitable fee will not merge in a partial or particular interest." Besides in such a case "the true test of merger

5. is the intention of the party, either expressed or implied. If the intention has not been expressed it will be sought for and ascertained in all the circumstances of the transaction. If it appears from all the circumstances to be for the benefit of the party acquiring both interests, that merger shall not take place, but that the equitable or lesser estate shall be kept alive, then his intention that such a result will follow will be presumed and equity will carry it into execution by preventing a merger. If, from all the circumstances, a merger

would be disadvantageous to the party, then his intention that it should not result will be presumed." *Chase v. VanMeter* (1894), 140 Ind. 321, 333, 39 N. E. 455, and cases cited; 20 Am. and Eng. Ency. Law (2d ed.), 590, and authorities cited in note. We are of the opinion that the facts as herein indicated do not bring the instant case within the merger rule above announced.

We next consider appellant's contention that "parties to a valid sealed instrument and their privies are estopped to deny the force and effect of such instrument by any evidence of inferior solemnity." This contention is supported by authority. Bigelow, Estoppel (2d ed.) 239. However, in this connection it should be stated that

before a person should be estopped by his
6. deed such deed must be certain as to the precise fact upon which the estoppel is to operate; that is to say "no one shall be denied setting up the truth unless it is in plain and clear contradiction to his former allegations and acts." 11 Am. and Eng. Ency. Law (2d ed.), 388-399 and notes.

The deeds relied on by appellant to estop appellees from asserting the partition made pursuant to said parol agreement, excepting that, *supra*, from Maria to Robert of date March 25,

7. 1896, are quitclaim deeds. In an annotated note to the case of *Babcock v. Wells* (1903), 25 R. I. 23, 105 Am. St. 848, 863, the editor says: "No estoppel arises either from making or accepting a quitclaim deed. Both the grantor and the grantee remain at liberty to prove that no interest or estate was transmitted thereby. Hence, as we have already shown, the grantor may assert any title subsequently acquired by him, and the grantee,

whenever the question becomes material, may show that his grantor had no estate, right, title or interest to convey and consequently that nothing passed by the deed." *City, etc. v. Lawton*, (1881), 18 Cal. 465, 475-476, 79 Am. Dec. 187; *Flagg v. Mann* (1883), 14 Pick. (Mass.) 467, 481; *Bigelow v. Finch* (1851), 11 Barb. (N. Y.) 498, 500; *Kingman v. Sparrow* (1851), 12 Barb. 201, 208; *Lytle v. Beveridge* (1874), 58 N. Y. 592.

In *Olmstead v. Tracy* (1906), 145 Mich. 299, 116 Am. St. 301, the court says: "The deed in which, in 1883, plaintiff joined, which he now revokes, was a quitclaim deed, not an assertion of any particular, or of any, title. It did not of itself operate as an estoppel against either the grantor or grantee as to the nature or extent of the title. *Sands v. Davis* (1879), 40 Mich. 14, 20."

It follows that the estoppel by deed, if any, must arise on account of the deed of appellees' grandmother in which she deeded to her son Robert (appellees' father and remote grantor) the undivided one-half of the two-thirds, and to appellant and Calvin, each, the undivided one-fourth of the two-thirds of the 61 acres, reserving to herself a life estate therein. It is through this deed alone, so far as the evidence shows, that appellees must base their claims to any right or interest in said real estate. Under it their father obtained an undivided one-third (one-half of two-thirds) interest in both the 21-acre and the south 40-acre tracts. The same interest was sold at sheriff's sale to the grandfather of appellees. It is true the grandfather in his will attempts to devise 20 acres of the south 40-acres but he could give no more than he had in such tract, which as before stated was only an undivided one-third interest in the 61 acres. We

are of the opinion that appellees, by the deed 8. through which they claim title, are estopped from asserting that, by reason of a partition had between their remote grantors and appellant before the making of such deed, they are entitled to an interest or title in the real estate different from that expressed in their deed, in the absence of a showing of fraud or mistake connected with the execution of such deed and such issue was neither tendered by the pleadings nor shown by the evidence.

Appellee, however, in effect claims that after the making of the deeds the appellant and his mother continued to occupy and separately farm their respective tracts and continued to take the rent therefor, etc., and hence acquiesced in and ratified the partition before made. While, as before stated, there is no averment of a partition after the making of said deeds or of a ratification of the partition previously made in either appellees' answer or cross-complaint; yet, in view of the admitted facts in this case, and the questions here presented, we are inclined to give appellees the benefit of any evidence pertinent to such an issue. However, the evidence which comes to us, in so far as it can be said to support any partition or ratification thereof after such deed was made, shows a partition or an arrangement between the mother and appellant, at a time when the mother had nothing to partition. By her deed to her sons, she had conveyed to them her interest in the fee in the entire 61 acres, and hence any arrangement between her and appellant after the conveyance could only affect her life estate in said land. The evidence places appellees in a peculiar situation, in this: If it be conceded that there was a fully consummated partition of the 61 acres before the deed made by their grandmother, Maria, to their father, Robert, on March

25, 1896, then the deed to their father, in so far as it attempted to convey the undivided one-half of two-thirds of the 21 acres, was a nullity because the grandmother herself, had lost all title in the 21 acres by reason of such partition; hence appellees' father by such deed obtained only an undivided one-third of the south 40-acre tract, and appellees who claim through such deed could likewise obtain no greater interest than their grantor had. On

the other hand there is no evidence to show

9. any partition after the making of said deeds, nor any after ratification of any partition before made, except the partition had between the mother and appellant after the mother had conveyed all interest she had in the fee. So that, giving to appellees the advantage of all the evidence as it comes to us and giving it as broad an application as possible under the issues, we are forced to the conclusion that it will not sustain the decision of the trial court, and that such decision is contrary to law.

The judgment below is therefore reversed with instructions to the trial court to grant appellant's motion for new trial, and with leave to the parties to reform the issues if they so desire, and for any further proceedings consistent with this opinion.

NOTE.—Reported in 112 N. E. 835. Merger of estates (99 Am. St. 153) as dependent on intention of parties, 7 Ann. Cas. 700. Parol partition, validity, 8 Ann. Cas. 405. See, also, under (1) 4 C. J. 900; (4), (5), (9), 16 Cyc 665-667; (7) 16 Cyc 688.

HOLLANDER v. FLETCHER.

[No. 9,083. Filed May 22, 1916.]

1. *APPEAL.—Review.—Sufficiency of Complaint.*—Under the provision of §348 Burns 1914, Acts 1911, p. 415, if no objection to a complaint is taken by demurrer or answer, defendant is deemed to have waived all objections except the jurisdiction of the court over the subject of the action, and he can not, on appeal, for the first time, raise the question that the complaint does not state facts sufficient to constitute a cause of action. p. 150.
2. *PLEADING.—Defenses.—Sufficiency.*—Under §391 Burns 1914, §382 R. S. 1881, providing that an answer or other pleading shall be rejected as sham when it appears on the face thereof to be false, or is shown to be so by the answers of the party to special interrogatories propounded to ascertain the falsity of such pleading, *held*, that it must appear *plainly*, however, from such answers that the pleading sought to be stricken out is false. p. 152.
3. *PAYMENT.—Plea.—Evidence.*—Under a general plea of payment it is not necessary to prove payment by direct or positive evidence, but it may be established by all the facts and circumstances shown by the evidence. p. 153.
4. *PLEADING.—Motion to Strike Out.—Answer.—Sufficiency.*—In an action on a note defendant pleaded payment and in answer to special interrogatories averred the payment and undertook to show how the note was paid, setting forth certain transactions with the plaintiff in reference to such note. Section 391 Burns 1914 §382 R. S. 1881, declares that an answer shall be rejected as sham when shown to be false by answers to special interrogatories propounded to ascertain that fact. *Held*, that it was erroneous to strike out defendant's plea of payment for the reason that it does not plainly appear from the defendant's answers to interrogatories that his answer of payment was false and that it was improper, on a motion to strike out, to draw inferences from such answers to interrogatories and to balance the probabilities arising from such inferences to sustain the conclusion that the plea of payment was false. p. 155.

From Lake Circuit Court; W. C. McMahan, Judge.

Action by Nathan Fletcher against Harry Hollander. From a judgment for plaintiff, the defendant appeals. *Reversed*.

Sheehan & Lyddick, for appellant.

Robert M. Davis, for appellee.

McNUTT, J.—This was a suit by appellee against appellant on a promissory note, a copy of which is set out in the complaint. Appellant, by his first assignment of error, attacks the sufficiency of the complaint for the first time in this court. The suit was begun in the court below in the April term, 1914, which was long after §§1, 85 and 89 of an act concerning proceedings in civil actions, approved April 7, 1881 (Acts 1881 [s.s.] p. 240, §§249, 339, 343 R. S. 1881, §§249, 344, 348 Burns 1908), as amended by the Act of 1911 (Acts 1911 p. 415, §§249, 344, 348 Burns 1914) were in force. Section 89, *supra*, as amended by §3 of the amendatory act, being §348 Burns 1914, *supra*, eliminates from the original section the right therein reserved to assign

1. as error in this court "the objection that the complaint does not state facts sufficient to constitute a cause of action." It follows, therefore, that no error is presented by said first assignment. *Robinson v. State* (1912), 177 Ind. 263, 97 N. E. 929; *Stiles v. Hasler* (1914), 56 Ind. App. 88, 104 N. E. 878.

Appellant's second and fourth assignments of error challenge the correctness of the court's ruling in sustaining appellee's motion to strike out the second paragraph of appellant's answer, which was a general plea of payment. Appellee, for the purpose of ascertaining whether said second paragraph of answer was false, under §391 Burns 1914, §382 R. S. 1881, submitted certain special written interrogatories which appellant was ordered to answer under oath. Said interrogatories and answers are as follows: "1. Did you execute the note described in plaintiff's complaint? Answer, Yes. 2. Has the principal of said note or interest thereon, or any part of either principal or interest, been paid? Answer, Yes. 3. If No. 2 is answered in the affirmative, state

what the payment or payments consisted of, the amounts paid, and date or dates of payment. Answer. This affiant was engaged to the daughter of the plaintiff and they were to be married and in February or March, 1914, the exact date to the affiant is unknown, this plaintiff came to the defendant's place of business and said that he, the plaintiff, would not permit him, the defendant, to marry his, the plaintiff's daughter, because he, the defendant, was a poor man and not fit for his daughter, and this defendant then and there demanded the return of jewelry he had presented to the daughter and money he had expended in his courtship with her and the said plaintiff then and there agreed to return to the defendant his said note with the understanding that the same should be considered paid in defendant's release of said plaintiff's daughter from said engagement and not the return of the jewelry to this affiant and the money laid out and expended in his courtship, and to which this plaintiff and said defendant then and there agreed. 4. If No. 2 is answered in the affirmative state to whom, how and where said payment or payments were made and whether or not receipt for same was received. Answer. See answer to No. 3. 5. If No. 2 is answered in the affirmative and any payments claimed to have been made to any person other than the plaintiff state why said payments were to said party made, what, if anything was said at the time of payment concerning credit on said note or affecting it, or showing authority from plaintiff of party to accept payments thereon. Answer. See answer to No. 3."

After appellant filed his answers to the interrogatories, appellee moved the court to strike out the second paragraph of answer for the reason that the answers to the special written interrogatories showed

that the answer of payment was false in fact, and intended merely for delay. The court sustained this motion and appellant excepted.

Section 391 Burns 1914, *supra*, reads as follows: "An answer or other pleading shall be rejected as sham, either when it plainly appears upon the face thereof to be false in fact, and intended merely for delay, or when shown to be so by the answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false; and all surplusage, tautology, and irrelevant matter shall be set aside and struck out of any pleading, when pointed out by the party aggrieved."

Under said section, if an answer is shown to be false by answers to special interrogatories, it is proper to strike it out on motion. *Lowe v.*

2. *Thompson* (1882), 86 Ind. 503; *Pittsburgh, etc., R. Co. v. Frazee* (1898), 150 Ind. 576, 50 N. E. 576, 65 Am. St. 377; *Tilden v. Louisville, etc., Co.* (1901), 157 Ind. 532, 62 N. E. 31. But it must plainly appear from such answers that the pleading sought to be stricken out is false. *Pittsburgh, etc., R. Co. v. Frazee, supra.*

In the case of *Atkinson v. Wabash R. Co.* (1896), 143 Ind. 501, 509, 41 N. E. 947, the court said: "It is settled that where averments or matter in a pleading are in any way material, they ought not to be struck out on motion, and the recognized test of their materiality is to inquire whether they tend to constitute a cause of action or defense; if they do they are not irrelevant and ought not to be suppressed."

In the case of *Clark v. Jeffersonville, etc., R. Co.* (1873), 44 Ind. 248, the court said: "When a demurrer is sustained to a pleading, the party has a right to amend, but when a pleading is stricken out, it cannot be amended, for it is out of the record.

The party then must either reserve the question by a bill of exceptions and seek relief in this court, or obtain the leave of the court to file another pleading. For this reason, motions to strike out are not to be encouraged, unless it is manifest to the court that it would be to the prejudice of the party that has to answer or reply, to suffer the objectionable matter to remain. *Molony v. Dows*, 15 How. Pr. (N. Y.) 261."

Under a general plea of payment it is not necessary to prove payment by direct or positive evidence, but it may be established by all the

3. facts and circumstances shown by the evidence. *Hays v. Hays* (1912), 49 Ind. App. 298, 97 N. E. 198; *Wolcott v. Ensign* (1876), 53 Ind. 70.

Appellant contends that the answers to the interrogatories set forth sufficient facts and circumstances to show payment of the note sued on, but insists that even if they did not, the answers to the second and third interrogatories were in such conflict that the court should have left it to be determined on trial as to the truth or falsity of the question of payment, and cites and relies upon the case of *Pittsburgh, etc., R. Co. v. Frazee, supra*. In that case the court said (at page 576): "The court, we think, properly overruled the motion to reject the complaint. The statute requires the court not only to reject, as sham, an answer, but any other pleading 'either when it plainly appears upon the face thereof to be false in fact, and intended merely for delay, or when shown to be so by answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false.' * * *

The appellant propounded interrogatories to appellee for that purpose, and they were answered by him. The object of such interrogatories, and the answers

of appellee thereto, was to show that the allegation in the complaint that he was free from contributory negligence was false. The particular contributory negligence sought to be shown by the answers to the interrogatories was whether appellee looked both ways and listened attentively for a coming train of cars and whether he saw the train, as he approached the crossing, in time to avoid injury thereby. Appellee's answers to the interrogatories specifically and directly state that he did so look and listen, and did not see the train in time to avoid the injury he suffered thereby. But appellant contends that the answers disclose a number of physical facts and surrounding circumstances sufficient to show that the answers to such interrogatories were false, either in stating that appellee did so look and listen, or, if he did so look and listen, that he did not see the train. Such a state of facts does not comply with the statute requiring the rejection of the pleading as sham for its falsity. It must plainly appear, either upon its face, or by answers to the interrogatories to be false. Here it does not plainly appear on the face of the complaint, nor does it so appear from the answers that the particular allegation mentioned is false. The trial court could only reach the conclusion that it was false by weighing and balancing the probabilities arising from certain inferences to be drawn from physical facts, the lay of the land, the railroad track and the highway, the presence or absence of obstructions to the sight of the coming train stated in said answers to said interrogatories, tending to show that appellee might have seen the same as he approached the crossing. In other words, the court below was required to weigh and determine whether the physical facts and surrounding circumstances set forth in said answers were sufficient, as appellant contends they were, to overcome and destroy the appel-

lee's positive statement that he did look both ways and listened attentively as he approached the crossing, and failed to see or hear the train in time to avoid being struck thereby. In such a case the question of fact thus presented cannot be tried and determined on a motion to reject the pleading."

So in the case at bar, appellant's second answer is positively that he paid the note. While it is true that in his third answer he undertakes to state

4. how the note was paid, many inferences might be drawn therefrom, and the trial court could only reach the conclusion that the answer of payment was false by weighing and balancing the probabilities arising from such inferences tending to show payment. We are of the opinion that it does not plainly appear by the answers to interrogatories that appellant's answer of payment was false, and this question should have been submitted to the court under the issue made thereon by appellee's reply in denial. Appellee's motion to strike out the second paragraph of appellant's answer should have been overruled.

As the judgment must be reversed for this error, the other questions raised by appellant in his brief need not be decided. Judgment reversed, with instructions to overrule appellee's motion to strike out appellant's second paragraph of answer, and for further proceedings consistent with this opinion.

NOTE.—Reported in 112 N. E. 847. See under (3) 30 Cyc 1260· (4) 31 Cyc 628.

SMITH ET AL. v. FISCUS ET AL.

[No. 8,929. Filed January 26, 1916. Rehearing denied April 25, 1916. Transfer denied May 31, 1916.]

1. **BROKERS.—Real Estate Brokers.—Fraud.—Liability.**—Where it appears from the evidence that one of the appellants, a real estate broker, entered into a contract with the appellees to sell their land and did negotiate a sale of such land, but represented to appellees that he could secure a price for their land much less than that actually received and, by means of a conveyance to an associate, who then conveyed the land to the real purchaser, defrauded the appellees of a large part of the purchase money, which money so fraudulently obtained was divided between himself and coappellants, *held*, that even if no actual fraud was shown, the conduct of such broker would amount to constructive fraud, as the contract to sell the real estate for appellees created a fiduciary relation which cast upon him the duty of acting in the utmost good faith. p. 159.
2. **CONSPIRACY.—Fraud.—Defenses.**—It is no defense that there was no conspiracy entered into in the beginning of the transaction and, if the arrangement between appellants was entered into during the progress of the negotiations for the sale of appellees' land, and if appellants knowingly accepted benefits from such arrangement, they thereby created an illegal conspiracy. p. 159.
3. **CONSPIRACY.—Fraud.—Liability.**—No affirmative fraudulent representation need be shown to establish a fraudulent conspiracy; a concealment of the true nature of the action being sufficient to bind all who accede to, or concur in such concealment, and all parties to an illegal conspiracy are bound by the acts of their agents. p. 160.
4. **APPEAL.—Evidence.—Sufficiency.**—The court, on appeal, is bound to view the evidence in the light most favorable to the party successful below in considering the question of the sufficiency of the evidence to sustain the verdict. p. 161.

From Greene Circuit Court, *Theodore E. Slinkard*, Judge.

Action by Noah Fiscus and others against John H. Smith and others. From a judgment for the plaintiffs, defendants appeal. *Affirmed*.

Homer Elliot and Cyrus E. Davis, for appellants.

W. V. Moffet, Willis Hickman and Hubert Hickman, for appellees.

SHEA, J.—This was an action by appellees Noah and Mary E. Fiscus, husband and wife, against appellants, John H. Smith, Inman H. Fowler, Tyson T. Bixler, Freyl Crane, John C. H. Baker, Charles E. Hernly and the Exchange Bank, to recover a sum of money claimed to be due appellees on account of land sold by appellants for appellees, the proceeds of which, it is alleged, were not fully accounted for. The amended complaint, which was in two paragraphs, alleges substantially that appellant Smith, as a real estate agent, took a written contract from appellees, who were very old and feeble in body and mind, to sell 120 acres of land for them for a commission of \$120; that Smith sold the land as such agent to one Philip Stanford for \$3,685, and, by an arrangement entered into between himself and his coappellants, he kept in secrecy from appellees the fact that he had received \$3,685 for the land sold, and falsely represented to appellees and led them to believe that he had only obtained \$1,805 therefor; that he had settled with appellees on that basis, and he and his coappellants divided the remainder of the purchase money, so wrongfully obtained, among themselves, and retained the same and refused to pay over the money after demand by appellees for repayment thereof, with full knowledge of all the facts and with the intent to cheat, wrong and defraud appellees; that the money was so obtained from appellees by means of fraudulent misrepresentations and concealments, and without their knowledge or consent. Judgment for \$2,000 is prayed.

Appellants answered the complaint in general denial, and a trial resulted in a verdict and judgment for appellees for \$1,272. The only question properly presented in this case is the alleged error of the court in overruling appellant's motion for a new trial, in

support of which it is argued that the verdict of the jury is contrary to law, and that the verdict of the jury is not sustained by sufficient evidence.

There is evidence from which the jury may very well have found every material allegation in both paragraphs of appellee's complaint; that is to say, there is evidence which shows that appellant Smith entered into a written contract to sell the real estate mentioned in the complaint, eighty acres of which had theretofore belonged to Noah Fiscus, and forty acres of which had belonged to his wife and coappellee; that at the time Noah Fiscus was indebted to the Exchange Bank in the sum of \$1,205; that Mary E. Fiscus had no debts; that appellant Smith, who was cashier of the bank, visited appellees at their home and induced Noah Fiscus to convey his eighty acres of land to his wife for the purpose of having a mortgage executed to said bank to secure the payment of the said debt; that at the time of the execution of said deeds and mortgage, said Smith also entered into a written contract with appellees to sell or exchange their land for them for the purpose of paying off the debt due the bank; that Smith negotiated a trade for the 120 acres of land to one Philip A. Stanford for the sum of \$3,685; that while said negotiations were pending, and after the terms of sale and transfer had been agreed upon, Smith represented to appellees that he could sell the 120 acres of land for \$1,805 and no more, and induced appellees to accept that amount, \$1,205 to be paid to the Exchange Bank which sum was due them, and a conveyance of thirteen acres of land valued at \$600; that during the pendency of the negotiations Smith entered into an arrangement with his coappellants to share with them the profits of said transaction, and in pursuance thereof procured the conveyance of the 120 acres of land to be made to ap-

pellant Bixler, as trustee for the Owen County Land and Improvement Company, composed of Smith, Bixler and other coappellants, who afterward conveyed the property to Philip A. Stanford for the consideration previously agreed upon between Stanford and Smith, which consideration was paid in cash, the conveyance of the thirteen acres of real estate, and three \$500 notes amply secured. The excess thus obtained by Smith over the amount paid to appellees, being about \$1,500, was divided among appellants in this case.

The evidence shows that appellees were defrauded in this transaction; that appellant Smith, while ostensibly acting as the agent for appellees,

1. managed the transaction in such way as to cause the loss to appellees and a corresponding gain to himself and his coappellants, who knowingly shared with him in the profits obtained under such circumstances. Appellant Bixler allowed himself to be made the channel through which the plan was carried out. If no actual fraud was shown, this conduct would amount to constructive fraud upon the part of appellant Smith, as the contract to sell real estate for appellee created a fiduciary relation which cast upon him the duty of acting in the utmost good faith. *McCord v. Bright* (1909), 44 Ind. App. 275, 87 N. E. 654.

It will not be sufficient excuse for this conduct to say there was no conspiracy entered into in the beginning of the transaction. If the arrangement, conspiracy, or whatever it may be called,

2. was entered into during the progress of the negotiations, and appellants accepted benefits under the circumstances, in the eyes of the law an illegal conspiracy was formed. This can not receive the sanction of this court. The rule is well stated in 6 Am. and Eng. Ency. Law 864, 865, as follows:

"It is not necessary, in order that the fact of a conspiracy may be established, that it should be proved by evidence of an express agreement or compact between the alleged conspirators, or by direct evidence of any agreement or compact. A conspiracy may be proved inferentially, or by circumstantial evidence. Conspiracies from their very nature, it has been said, are usually entered into in secret, and are consequently difficult to be reached by positive testimony, which renders it peculiarly necessary and proper to permit them to be inferred from circumstances."

It frequently has been held that no affirmative fraudulent representations need be shown, a concealment of the true nature of the action

3. being sufficient. *Place v. Minster* (1875), 65 N. Y. 89.

In the case of *Wolfe v. Pugh* (1885), 101 Ind. 293, 308, the court uses this language: "All who accede to, concur in, and willingly and knowingly become parties to and further a conspiracy, are parties to it, without proof of further or previous agreement to concur in and further it." It is the judgment of this court that all persons connected with the Owen County Land and Improvement Company were bound by the acts of Smith and Bixler. *Mendenhall v. Stewart* (1897), 18 Ind. App. 262, 47 N. E. 943; *Sanderson v. State* (1907), 169 Ind. 301, 82 N. E. 525.

The evidence fully sustains the verdict. The verdict is not contrary to law. No reversible error was committed in the admission or refusal to admit certain evidence complained of.

Many technical questions are raised with respect to the instructions given by the court, and those tendered by appellant which were refused. We have examined the instructions and find no error of

substantial merit which would warrant this court in reversing this judgment.

Taking into account the evidence most favorable to appellees, which we must do in considering questions of the sufficiency of the evidence

4. to sustain the verdict on appeal to this court, we are of the opinion that the trial court reached a proper conclusion in holding that there was a fraudulent conspiracy, which resulted in loss to these appellees in the amount for which they obtained the judgment. Under such circumstances this court will not disturb it. *National Live Stock Ins. Co. v. Wolfe* (1915), 59 Ind. App. 418, 106 N. E. 390. The death of appellant Charles E. Hernley was suggested prior to the date of submission. Upon appellees' petition Frost B. Hernley, administrator of Charles E. Hernley's estate, is substituted.

Judgment affirmed.

NOTE.—Reported in 111 N. E. 203. Fraud and secret dealings of real estate brokers, note, 45 L. R. A. 33. See under (1) 9 C. J. 537; 19 Cyc 205; (3) 8 Cyc 648.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD CO. ET AL. v. DUNCAN.

[No. 9,004. Filed June 1, 1916.]

1. MASTER AND SERVANT.—*Personal Injuries*.—*Contracts for Relief*.—Under §5308 Burns 1914, Acts 1907, p. 46, relief association contracts which contain a provision whereby claims for personal injuries are waived by one becoming a member of such association, are declared void and an action to collect benefits under such a contract can not, therefore, be maintained. p. 163.
2. ACTION.—*Grounds*.—*Illegal Contract*.—An action can not be predicated upon a contract declared void by statute. p. 164.

From Knox Circuit Court; *Benjamin M. Willoughby*, Judge.

Action by William E. Duncan against the Baltimore & Ohio Southwestern Railroad Company and others. From a judgment for plaintiff, the defendants appeal. *Reversed.*

W. R. Gardiner, C. K. Tharp, C. G. Gardiner, W. C. Johnson and Edward Barton, for appellants.

Leroy M. Wade and A. J. Padgett, for appellee.

CALDWELL, C. J.—Appellee, as a member of the relief department maintained by appellants, brought this action to recover total disability sick benefits for 312 days at \$1.59 per day. A trial by the court resulted in a judgment for appellee in the sum of \$477. To determine this appeal, it will be necessary for us to consider only the assignments in the motion for a new trial that the decision is not sustained by sufficient evidence, and that it is contrary to law.

The record discloses the following facts: September 30, 1909, appellee was an employe of the Baltimore & Ohio Southwestern Railroad Company, as a yard conductor at Vincennes, on which day he became a member of such relief department. For a number of years prior to that date, the Baltimore & Ohio Railroad Company had maintained such relief department, its employes being members thereof. Under the plan of organization, employes became members of the relief department by application, medical examination and contract. An employe having been accepted as a member, and having signed the required contract, paid to the department a certain per cent. of his wages each month, the payments being made in fact by being retained from his wages by his employer and turned into the relief department, in consideration of which the member in case of his sickness or injury, or his beneficiary in case of his death, was entitled to receive from the department certain benefits. The two companies entered into a contract July 1, 1909, by

virtue of which the relief department was extended to the employes of the Baltimore & Ohio Southwestern Railroad Company. As required by the rules of his employer, appellee submitted to a medical examination from time to time to determine his fitness to continue in the service. Certain examinations made in the latter part of 1911, and perhaps early in 1912, disclosed that appellee was a victim of defective color perception, or color blindness, by reason of which his employer released him from service February 15, 1912. Between that date and November 29, 1913, appellee was out of employment a portion of the time. On the latter date he entered the service of the Vandalia Railroad Company as brakeman and switchman, and was still in such service at the time of the trial. Appellee as a member of the relief department contributed three dollars per month thereto, and under the terms of his contract, by virtue of which he became a member of such department, he was entitled to receive \$1.59 per day while totally disabled by sickness or other cause than accidental injury received in the line of duty. This action was brought on the theory that color blindness is such total disability. We find it unnecessary to determine the soundness of such theory.

In order that appellee may maintain this action, it must appear that the contract between him and appellants and on which he bases his action

1. is valid and binding. The relief department maintained by appellants has recently been considered by the Supreme Court and also by this court, and held to be within the prohibition of the act of 1907. Acts 1907 p. 46, §5308 Burns 1914. See *Baltimore, etc., R. Co. v. Hagan* (1915), 183 Ind. 522, 109 N. E. 194; *Baltimore, etc., R. Co. v. Miller* (1915), 183 Ind. 323, 107 N. E. 545; *Acton v. Balti-*

more, etc., *R. Co.* (1915), 59 Ind. App. 280, 108 N. E. 535. The features of the relief department bringing it within the condemnation of the act fully

2. appear in the opinions in the cases above cited, and are, therefore, not set out here.

Under the decisions, the contract upon which appellee predicates his cause is void and he cannot, therefore, maintain his action. It results that the decision is not sustained by sufficient evidence, and that it is contrary to law. See also *Boes v. Grand Rapids, etc., R. Co.* (1915), 59 Ind. App. 271, 108 N. E. 114; *Wells v. Vandalia R. Co.* (1914), 56 Ind. App. 211, 103 N. E. 360.

Judgment reversed, with instructions to sustain the motion for a new trial.

NOTE.—Reported in 112 N. E. 898. Contracts by servants waiving right to recover for injuries, 3 Am. St. 255; or requiring an election between the acceptance of benefits from a relief fund and an action for damages, notes, 48 L. R. A. (N. S.) 443, 444. See under (2) 9 Cyc 546.

GRAVES, ADMINISTRATOR v. KELLY, ADMINISTRATRIX.

[No. 9,063. Filed June 2, 1916.]

1. **APPEAL.—Briefs.—Specification of Errors.**—Under a rule of court that the appellant's brief shall contain a concise statement of so much of the record as fully presents every exception and error relied upon, failure to set out a motion for change of venue from the judge, the demurrer and memorandum, and a motion for a new trial, or the substance of either, will amount to a waiver, on appeal, of such assignments of error. p. 166.
2. **JUDGMENT.—Vacating.—Pleadings.**—No formal pleadings beyond the complaint or motion of the party seeking relief is required in proceedings under the latter clause of §405 Burns 1914, §396 R. S. 1881, which provides that the court shall relieve a party from a judgment taken against him, through his mistake, inadvertance, surprise or excusable neglect, and supply an omission in any proceedings on complaint or motion filed within two years. p. 167.
3. **JUDGMENT.—Vacation.—Trial.**—In a proceeding under §405 Burns 1914, §396 R. S. 1881, matters presented by the complaint or motion should be heard by the court in a summary manner. p. 167.

4. JUDGMENT.—*Vacation.*—*Evidence.*—In a proceeding under §405 Burns 1914, §396 R. S. 1881, no counter affidavits or contradictory evidence should be received on the question whether the party seeking relief has a meritorious cause of action or defense, but on all other questions involved any competent evidence offered by either party should be heard. p. 167.
5. EVIDENCE.—*Judicial Knowledge.*—*Uncontroverted Pleadings.*—Where the only evidence properly before the court was the complaint, the allegations of which were uncontroverted, the court was not precluded from finding the facts to be otherwise than as set forth in such complaint by resorting to its judicial knowledge. p. 170.
6. EVIDENCE.—*Judicial Notice.*—In an action commenced under §405 Burns 1914, §396 R. S. 1881, seeking relief from a judgment, the court may take judicial notice of its record made in the case in which such judgment was obtained and the facts established by such record. p. 170.

From Noble Circuit Court; *Luke H. Wrigley*, Judge.

Action by James Graves, administrator of the estate of John D. Kelly, deceased, against Emma F. Kelly, administratrix *de bonis non* of the estate of John D. Kelly, deceased. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

T. A. Redmond and *Rex S. Emerick*, for appellant.
Grant & Foote and *Finley & Finley*, for appellee.

McNUTT, J.—On March 13, 1914, appellant, as plaintiff, filed his complaint in the court below against appellee, the administratrix *de bonis non* of the estate of John D. Kelly, deceased, as defendant, seeking to be relieved from a judgment, under the provisions of the last clause of §405 Burns 1914, §396 R. S. 1881, alleged to have been rendered by said court against him on March 14, 1913. The complaint was in two paragraphs duly verified by affidavit. Summons was ordered by the court and duly served upon appellee, who appeared to said action. Before any issue was tendered or any action taken by the court, appellant filed his verified motion for a change of judge, which was overruled,

and appellee excepted. Appellee demurred separately to each paragraph of the complaint for want of sufficient facts to entitle appellant to the relief prayed for, and the demurrers were sustained by the court and appellant excepted. Appellant refused to plead further and the court rendered judgment against him that he take nothing by his suit, and that appellee recover her costs. Appellant filed his motion for a new trial which was overruled. Appellant assigns as error in this court: (1) The overruling of his motion for a change of judge; (2) the sustaining of appellee's demurrer to each paragraph of complaint; (3) the overruling of his motion for a new trial.

Appellant has failed in one particular to comply with the rules of this court in the preparation of his brief. Under his "concise statement of so

1. much of the record as fully presents every exception and error relied upon," appellant has failed to set out in the motion for a change of judge, the demurrer and memorandum, and the motion for a new trial, or the substance of either. By this failure, appellant has waived the first and last assignments of error. *Pry v. Ramage* (1911), 176 Ind. 446, 96 N. E. 385, and cases cited. As will be noted in this opinion, the failure to set out the demurrer and memorandum in the brief becomes immaterial.

The latter clause of §405 Burns 1914, *supra*, relied on by appellant, reads as follows: "The court * * * shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect, and supply an omission in any proceedings on complaint or motion filed within two years." Appellee insists that this section, being a part of the civil code, has no application to the instant case, because the original controversy was one

governed wholly by a special statute relating to the settlement of decedents' estates. We do not deem it necessary to, and do not, decide this question.

It is well settled by the decisions of our

2. Supreme Court that proceedings under said clause require no formal pleading beyond the complaint or motion of the party seeking relief. *Nord v. Marty* (1876), 56 Ind. 531; *Lake v. Jones* (1874), 49 Ind. 297; *Buck v. Havens* (1872), 40 Ind. 221.

There was a similar attempt to make issues in the case of *Nord v. Marty*, *supra*, and on that subject the court said: "In the case at bar, the appellee demurred to appellant's verified complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. This was tantamount, in our opinion, to a submission of the cause to the court below for a hearing on the facts set out in the verified complaint. By sustaining the appellee's demurrer to said verified complaint, the court simply held that the showing therein made was not sufficient to entitle the appellant to be relieved from the judgment taken against him. The error assigned by the appellant, we think, fairly presents for our consideration the correctness of the decision of the court below."

It is also well settled that matters presented by such a complaint or motion should be heard by the court in a summary manner. *Ratliff v.*

3. *Baldwin* (1867), 29 Ind. 16. On such hearing no counter affidavits or contradictory evidence should be received on the question whether the party seeking relief from the judgment

4. has a meritorious cause of action or defense, as the case may be. On all other questions involved, any competent evidence offered by either party should be heard as in other cases. *Buck v. Havens*, *supra*.

It appears that no evidence was offered by either party, by way of affidavits or otherwise, and the question arises whether there was any evidence properly before the court other than the verified complaint.

So much of appellant's complaint as will disclose the nature of the original controversy, alleges in substance, that appellant was appointed administrator of said decedent's estate in 1906, qualified and acted as such until 1912, at which time he was, upon petition of appellee, who was the widow of decedent, removed from his trust and ordered by the court to file his final report as such administrator; that appellant filed such report in March, 1912, to which appellee filed exceptions; that such proceedings were had upon said final report and exceptions that on March 14, 1913, the court rendered judgment against appellant for \$1,344.95; that on March 14, 1913, appellant did not appear and make out his cause of action and submit evidence in support of his final report on account of his excusable neglect, inadvertence and mistake in this: That at said time he was a person of unsound mind, caused by excessive drinking, and was incapable of making out his cause of action and incapable of understanding and transacting the ordinary affairs of life; and that he continued to be of unsound mind until about January 1, 1914, and as soon thereafter as appellant was physically able he employed counsel to commence this cause of action. In addition to the above facts, the second paragraph of complaint alleges that appellant appeared only as a witness at the trial of said exceptions in obedience to a subpoena served upon him, but that he did not make out, or attempt to make out his cause of action, or introduce evidence to support his final report.

Upon appellee's petition, a writ of *certiorari* was

•

issued by this court, and in obedience thereto, the clerk below duly certified to this court the final report of appellant, the exceptions filed by appellee thereto, also the record of the trial and the findings and judgment of the court. The record shows the following proceedings were had on March 13, 1913: "No. 1317—James Graves, administrator of the estate of John D. Kelly, deceased. Emma F. Kelly as administratrix *de bonis non* of the estate of John D. Kelly, deceased. Exceptor. * * * Come again the parties hereto as aforesaid, and by agreement of said parties this cause is now submitted to the court for trial upon the exceptions of said Emma F. Kelly as administratrix *de bonis non* of the estate of John D. Kelly, deceased, to the final report of said James Graves as administrator of the estate of John D. Kelly, deceased, a jury, by agreement, being waived. And thereupon the trial of this cause commences and proceeds but it is not concluded. And the court having heard part of the evidence and there not being time to conclude or for further hearing and trial of this cause today, the time of adjournment having arrived, the further hearing thereof and trial of this cause is now adjourned until tomorrow morning at nine o'clock."

And on March 14, 1913:

"* * * Come again the parties hereto as aforesaid, and thereupon the trial of this cause is resumed, proceeds and is concluded and the arguments of counsel are heard. And the court having heard all the evidence and being fully advised in the premises, finds that the final report of said James Graves as administrator of the estate of said John D. Kelly, deceased, should be, and the same hereby is, rejected and not approved; that there is due from said James Graves as administrator of the estate of said John D. Kelly, deceased, to the estate of said

John D. Kelly, deceased, over and above all credits to which he is entitled and over and above the value of all services rendered by said James Graves to the estate of said John D. Kelly, deceased, as administrator thereof, the sum of thirteen hundred forty-four dollars and ninety-five cents (\$1,344.95), and that said James Graves and the sureties on his bonds as administrator of the estate of said John D. Kelly, deceased, are liable to said estate for the full payment of said sum of thirteen hundred forty-four dollars and ninety-five cents. And it is considered and adjudged by the court that said exceptor do have and recover of and from said James Graves all costs occasioned by the filing of the exceptions to his final report as administrator of the estate of said John D. Kelly, deceased, taxed at dollars and cents."

While the allegations of appellant's complaint are uncontroverted, this did not preclude the court, in our opinion, from finding the facts to be

5. otherwise by resorting to its judicial knowledge. 16 Cyc 852. We are of opinion that the record made by the court in the same case, was before the court, and that it thereby ascertained that the facts set forth in appel-

6. lant's complaint with reference to his appearance at the trial of the exceptions, and the judgment from which he sought to be relieved, were not true. The record shows that appellant was in court during the trial; that no such judgment as alleged was rendered against him; that in fact no judgment was rendered against him except for costs. In such a case, it is well settled that the court will take notice of its records made in the same case, and of the facts which they establish. *Clugish v. Koons* (1896), 15 Ind. App. 599, 43 N. E. 158; *Denney v. State, ex rel.* (1896), 144 Ind. 503, 42 N. E.

Kaiser v. Wittekindt—62 Ind. App. 171.

929, 31 L. R. A. 726; Hogate, Pl. & Pr. §353; 16 Cyc 915, 917, and authorities cited; *Bank of Montreal v. Taylor* (1899), 86 Ill. App. 388.

We hold that the right result was reached by the lower court in this case, and that the judgment therein must be affirmed; but we deem it proper to and also hold that the action taken by the trial court and the record made in the original proceedings did not in any manner determine or adjudicate appellant's personal liability, or the liability on his bond, if any.

Judgment affirmed.

NOTE.—Reported in 112 N. E. 899. Negligence or inadvertence of attorney, opening or vacating judgment, 80 Am. St. 264. See under (2) 23 Cyc 949; (5) 16 Cyc 852; (6) 16 Cyc 915.

KAISER, ET AL. v. WITTEKINDT, ET AL.

[No. 9,017. Filed June 2, 1916.]

1. **APPEAL.—Burden of Showing Error.**—On appeal the burden is on the appealing party to present to the court the errors relied upon for reversal. p. 174.
2. **APPEAL.—Presentation of Error.—Assignment of Error.**—The first step necessary to properly present such errors as are relied on for reversal is a proper assignment thereof on the transcript filed in the appellate court. p. 174.
3. **APPEAL.—Briefs.—Requisites in General.**—The brief must indicate such of the assigned errors as are relied on for reversal, as provided in Rule 22, cl. 4, of the Supreme and Appellate Courts, and should contain enough of the record and references thereto to present the ruling upon which each respective error relied on for reversal is predicated, and, where several errors are relied on, the requirement of the rules of the court is not met by a statement in appellant's brief of general propositions of law and a citation of authorities thereunder unless such brief indicates the error to which appellant seeks to apply his proposition of law and authorities. p. 174.
4. **APPEAL.—Review.—Sufficiency of Evidence.**—Where appellants, who were plaintiffs below, seek a reversal of a decision of the trial court on the ground that such decision was not sustained by sufficient evidence to entitle appellants to such reversal, the burden is upon them to show that there was undisputed evidence before the trial court in support of every element essential to the cause of action stated in the complaint,

and that such evidence as to each of such elements was susceptible to but one conclusion, that is, that such element had been proven. p. 175.

5. *APPEAL.—Reversal.—Insufficiency of Evidence.—Burden of Proof.*—Where, in an action for damages, it was alleged in the complaint that defendants contracted with the plaintiffs to furnish them a specified number of half beer barrels of the standard gauge and measurement as required by the United States government, and that the half barrels as furnished were larger than the regulation size resulting in damage to the plaintiff by reason of the excess beer placed therein, expense of recoopering, etc., and there was no evidence of any government law fixing any standard gauge for half barrels, nor was there any conclusive evidence that the half barrels furnished did not meet the contract requirement as to size, or that such half barrels holding an excess quantity were identified as those furnished by defendants, *held*, that appellant has not sustained his burden of showing that the decision of the trial court for the defendant was not sustained by sufficient evidence. p. 176.

From Vanderburgh Superior Court; *F. M. Hostetter*, Judge.

Action by Joseph P. Kaiser and Frank Schmidt, partners, against Adolph Wittekindt & Son, partners. From a judgment for defendants, the plaintiffs appeal. *Affirmed*.

Durre & Curry and *Corliss, Leete & Moody*, for appellants.

Philip W. Frey, John D. Welman, Walton M. Wheeler and *John H. Foster*, for appellees.

HOTTEL, P. J.—This is an appeal from a judgment in appellees' favor in an action brought by appellants to recover damages for an alleged breach of contract. The complaint is in one paragraph and charges that appellants are partners, doing business under the firm name of "Champion Brewery"; that on June 4, 1910, they were engaged in conducting a brewery and in manufacturing and selling beer under and by virtue of the laws of the United States government; that appellees were engaged in manufacturing and selling beer cooperage and on

said date, for the consideration of \$1,355.40, entered into an agreement with appellants to sell and deliver to them for use in their business "416 half beer barrels of standard gauge as required by the internal revenue department and the United States of America; that in pursuance to said contract and agreement * * * defendants did on the 4th day of June, 1910, warrant, sell and deliver to plaintiffs * * * 416 half beer barrels and received of plaintiffs the consideration therefor, \$1,355.40; that plaintiffs relying upon the experience and reputation of defendants in manufacturing beer cooperage, and believing said 416 half beer barrels were of standard gauge and measurement as required by the laws of the United States government, did use said 416 half barrels by filling the same with beer and selling said products upon the market; that said defendants well knew the purpose for which said barrels were * * * to be used by the plaintiffs when the same were contracted for and delivered; that said barrels * * * were not of standard gauge and measurement, but were largely in excess thereof, by reason thereof the plaintiffs were deceived, and at each time said half barrels were filled, plaintiffs believing the same were of standard gauge were induced to and did place in said barrels an excess quantity of beer of the total value of \$276, which was then and there the market price of said excess beer, and which sum the plaintiffs lost thereby; that by reason of the said breach, as aforesaid the plaintiffs were compelled to pay to the said government * * * \$960 for using said 416 barrels in their business as aforesaid. That plaintiffs were compelled to lay out and expend the sum of \$120 to have said barrels recoopered so as to conform to the requirements of the laws of the United States. That plaintiffs demanded of said defendants said sums

so paid out and expended" by them and defendants refused to pay; that by reason thereof appellants have been damaged in the sum of \$1,356. This complaint was not challenged by demurrer and the only answer was a general denial.

It is insisted by appellees that the specifications of error set out in appellant's brief are not such as can be reviewed upon appeal, and that such brief in other respects so far fails to comply with the rules of the court that no question is presented.

We deem it unnecessary to indicate or discuss the several suggested infirmities of such brief. It is

sufficient to say that in the appellate tribunal the burden is on the appealing party to properly present to such court the ruling or rulings of the trial court on which he relies for reversal. The first step necessary to such end is a proper assignment of errors on the transcript filed in this court. The brief must also point out or indicate such of the assigned errors as are relied on for reversal (*Wickersham v. McGaughey* [1914], 55 Ind. App. 669, 104 N. E. 770; *DuBois v. Home, etc., Assn.* [1915], 183 Ind. 343, 109 N. E. 188; *Judy v. Woods* [1912], 51 Ind. App. 325, 99 N. E. 792; Rule 22, cl. 4) and should contain enough of the record and references thereto to fairly present the ruling upon which each respective error so relied on is predicated. *Newman v. Horner* (1914), 55 Ind. App. 298, 103 N. E. 820; *McKinley v. Britton* (1913), 55 Ind. App. 21, 103 N. E. 349; *Bottema v. Tracy* (1915), 58 Ind. App. 96, 107 N. E. 741; *Mercer v. State* (1913), 179 Ind. 426, 428, 101 N. E. 482; Rule 22, cl. 5. Where several errors are relied on in appellant's brief, the requirement of the rules of the court is not met by a statement therein of general propositions of law and citation of authorities thereunder with no applica-

tion thereof to any particular error, but in such a case the brief must indicate the error to which appellant seeks to apply his proposition of law and authorities. *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218, and cases cited.

Under the construction of the rules above indicated, appellants present at most only that ground of their motion for a new trial which challenges

4. the decision of the trial court as not being sustained by sufficient evidence. To entitle them to a reversal on such ground, the burden is on them to show that there was undisputed evidence before the trial court in support of every element essential to the cause of action stated in the complaint, and that such evidence as to each of such elements was susceptible of but one conclusion, viz., that such element had been proven.

It is not easy to determine on what theory the complaint proceeds, but our examination of the evidence convinces us that whatever may have been the theory adopted in and by the trial court, the evidence was not such as to compel a decision in favor of appellant under the rule above stated. It would seem from the averments, *supra*, that appellants relied on a warranty, express or implied, that the half barrels purchased from appellees would conform to some government regulation as to the number of gallons that each half barrel would hold. Appellants have not cited any government regulation, and we know of none, regulating the manufacture of half barrels and fixing any gauge, or the standard gauge, for such half barrels. Indeed, it appears from the evidence that the custom among cooperage manufacturers is to make such half barrels a little large, viz., within a range of a small amount over fifteen and one-half to seventeen gal-

lons, so as to allow for shrinkage on account of re-pitching after they have been used.

Assuming, however, without so deciding, that appellees' contract with appellants required them to furnish appellants with half barrels holding

5. fifteen and one-half gallons and no more and that such contract was proven as alleged in the complaint, or that as to such element of appellants' cause of action, the proof necessary to recovery was made without objection and should be considered by this court, the evidence is not conclusive that the half barrels furnished by appellees did not meet this requirement. The evidence was probably conclusive that appellants had in their possession half barrels, some of which held a substantial excess over fifteen and one-half gallons, but the evidence was of such a character that the trial court may have had some doubt as to whether appellants had identified the barrels containing such excess as being the barrels furnished by appellees under such contract. As before stated, the burden was on appellants to prove their cause of action as stated or attempted to be stated in their complaint, and for the reasons indicated this court is unable to say that the evidence is such as to necessitate a decision different from that reached by the trial court.

Finding no reversible error in the record, the judgment below is affirmed.

NOTE.—Reported in 112 N. E. 896. See under (4) 4 C. J. 777; 3 Cyc 308, 360.

HARKER v. GRUHL.

[No. 8,987. Filed February 15, 1916. Rehearing denied April 27, 1916. Transfer denied June 2, 1916.]

1. **APPEAL.**—*Scope of Review.*—*Motion for Judgment on Interrogatories.*—Where, on appeal, the error relied on for reversal is the failure of the trial court to render judgment on the answers to interrogatories, the scope of the review is limited to the complaint, answer, the general verdict, and the interrogatories and the answers thereto. p. 180.
2. **TRIAL.**—*General Verdict.*—*Effect.*—A general verdict is a finding for the party in whose favor it is rendered on all the material issues involved in the action. p. 180.
3. **TRIAL.**—*General and Special Verdicts.*—The answers to interrogatories control the general verdict only when the conflict upon the face of the record is such as to be beyond the possibility of being removed by any evidence admissible under the issues in the cause. p. 180.
4. **MUNICIPAL CORPORATIONS.**—*Use of Streets.*—*Negligent Driving of Automobiles.*—Reckless or careless driving of an automobile on a much-traveled thoroughfare of a city constitutes actionable negligence. p. 181.
5. **MUNICIPAL CORPORATIONS.**—*Use of Highways.*—*Rights of Pedestrians and Automobile Drivers.*—Pedestrians and automobile drivers each have the right to pass and repass upon a public highway, but neither can so negligently exercise this right as to injure the other, and each is required to regulate his own use of the highway by the observance of ordinary care to avoid being injured or inflicting injury upon the other. p. 181.
6. **MUNICIPAL CORPORATIONS.**—*Use of Streets.*—*Rights of Pedestrians.*—A pedestrian, crossing a street where automobiles are passing and repassing, is bound to exercise only that degree of care that an ordinarily prudent person would exercise under the circumstances, and whether such degree of care was exercised is a question of fact to be determined by the jury. p. 182.
7. **MUNICIPAL CORPORATIONS.**—*Use of Streets.*—*Rights of Pedestrians.*—*Negligence.*—As a matter of law, a pedestrian, who is lawfully using a public thoroughfare need not be constantly looking or listening to ascertain whether automobiles are approaching under the penalty that, if he fails to do so, and is injured, his failure conclusively charges him with negligence. p. 183.
8. **MUNICIPAL CORPORATIONS.**—*Use of Streets.*—*Collisions.*—*Personal Injuries.*—*General and Special Verdicts.*—In an action to recover damages for personal injuries sustained by a pedestrian who was struck by an automobile, the jury rendered a verdict for the plain-

tiff, the complaint alleging, in substance, that the automobile was being operated at a dangerous rate of speed in excess of ten miles per hour, in a closely built-up portion of a town, and that the plaintiff was struck without warning by the machine while it was being negligently driven by an inexperienced operator. The jury found, in answer to interrogatories, that the plaintiff had started to cross the street when the automobile was thirty-five feet from her, and that she was struck when she reached a point in the street nine feet from the sidewalk; that the street was well lighted and the machine was equipped with lights; that she looked for approaching vehicles before starting to cross the street, but did not stop from the time she started to cross until she was struck by the automobile; that if she had stopped after leaving the sidewalk, she could have seen the automobile at any point between where she left the sidewalk and where she was struck. *Held*, that there was no such conflict between the answers to the interrogatories and the general verdict as to entitle the defendant to a judgment on the interrogatories, as it was for the jury to determine whether the plaintiff, in attempting to cross the street in the time and manner disclosed, exercised that degree of care that an ordinarily prudent person would have exercised. p. 183.

From Decatur Circuit Court; *Hugh Wickens*, Judge.

Action by Katherine Gruhl against Isaiah Harker. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

John W. Donaker, Ralph H. Spaugh, Tremain & Turner and Bennett & Davidson, for appellant.

C. J. Kollmeyer, Julius Sharpnack and Osborn & Hamilton, for appellee.

MORAN, J.—On April 5, 1913, appellee, while attempting to cross Main street in the town of Hope, Indiana, was struck by appellant's automobile, and she received severe injuries, which she alleges, in four paragraphs of complaint, were caused by the negligence of appellant, and for which she was awarded damages in the sum of \$500.

The jury trying the cause returned answers with the general verdict to forty-three interrogatories. The failure of the court to render judgment

on the answers to interrogatories is the error relied upon for reversal by appellant. Many of the allegations of negligence charged are common to each paragraph of the complaint. Without attempting to state technically the theory of each paragraph of the complaint, the leading allegations of the first paragraph are that appellant at the time of the injury operated his automobile at a high and dangerous rate of speed in excess of ten miles per hour in a closely built-up portion of the town of Hope; the second paragraph alleges that appellee was without warning struck by appellant's automobile, while it was being operated in a negligent manner by an inexperienced operator; the third paragraph alleges that appellee was struck by appellant's automobile while it was being operated in a careless and negligent manner, at a rate of speed such as to endanger life and limb; and, the fourth paragraph alleges that appellant failed to warn appellee of the approach of the automobile, which would have prevented the injury.

By the answers to interrogatories, the jury found, among other things, that between the hours of nine and ten o'clock p. m., April 5, 1913, appellee attempted to cross Main street in an easterly direction, which street runs north and south through the town of Hope; that at the time she so started to cross, appellant was thirty-five feet to the south of her, and when she reached a point in the street nine feet from the sidewalk, she was struck by the automobile, which was proceeding to the north. The street was well lighted and the machine was equipped with lights, which shone brightly. That she looked for approaching vehicles before attempting to cross the street, but did not stop from the time she started to cross until she was struck by the automobile; that, if she had stopped after leaving the sidewalk, she could have seen the automobile at any

point between where she left the sidewalk and where she was struck. It is very earnestly urged by appellant that the answers to the interrogatories disclose that appellee did not exercise that degree of care that a reasonably prudent person would have exercised under the circumstances for her own safety; and that the facts thus found are so inconsistent with the general verdict that both cannot stand.

It is well settled by our practice that the scope of the inquiry as to the question presented for consideration is limited to the complaint, answer,

1. the general verdict, and the interrogatories and answers thereto. It is equally as well settled that the general verdict necessarily
2. finds for appellee on all the material issues involved, and that the answers to interrogatories control the general verdict only when
3. the conflict upon the face of the record is such as to be beyond the possibility of being removed by any evidence admissible under the issues in the cause. *W. McMillen & Sons v. Hall* (1915), 59 Ind. App. 545, 109 N. E. 424; *Indianapolis, etc., R. Co. v. Lewis* (1889), 119 Ind. 218, 21 N. E. 660; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 53 N. E. 235.

The general verdict, among other things, finds that appellant was an inexperienced operator, and that at the time of the injury he operated his automobile in a closely built-up portion of the town of Hope at a high and dangerous rate of speed; that he operated it at the rate of ten miles per hour, and at a rate of speed such as to endanger life and limb, in a careless and negligent manner, without giving any warning to travelers upon the street.

At the time the injury occurred, there was a statute (§10465 Burns 1914, Acts 1913 p. 179),

which made it unlawful to operate an automobile at a greater rate of speed than eight miles per hour in the business and closely built-up por-

4. tions of any municipality of this state. It has been held that reckless and careless riding or driving on a much-traveled thoroughfare of a city constitutes actionable negligence. *Simons v. Gaynor* (1883), 89 Ind. 165; *Lauson v. Town of Fond du Lac* (1909), 141 Wis. 57, 123 N. E. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. 30.

The general verdict having established the negligence charged, the question for consideration is, Was appellee guilty of such negligence under the facts specially found as to preclude her from recovering as a matter of law? Appellant and appellee both were traveling upon the street at the time of the injury, each in the exercise of a right. As to their respective rights and reciprocal duties,

5. it may be stated generally that each had the right to pass and repass upon the street, but neither could so negligently exercise this right as to injure the other, and each was required to regulate his own use of the street by the observance of ordinary care to avoid being injured or inflicting injury upon the other. *Hennessey v. Taylor* (1905), 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396; 2 R. C. L. 1183; *Stringer v. Frost* (1889), 116 Ind. 477, 19 N. E. 331, 2 L. R. A. 614, 9 Am. St. 875; *Green v. Eden* (1900), 24 Ind. App. 583, 56 N. E. 240; *Apperson v. Lazro* (1909), 44 Ind. App. 186, 87 N. E. 97, 88 N. E. 99; *Hannigan v. Wright* (1905), 5 Pen. (Del.) 537, 63 Atl. 234.

Appellee attempted to cross a street running north and south, as aforesaid, at a much traveled part of the town of Hope, known as the public square; and when she started to cross the street, she looked for

the approach of vehicles. And when the automobile was but thirty-five feet away, there is nothing to disclose that she saw the same, nor do the answers to interrogatories show that there was no excuse for her failing to see the automobile. From aught that is disclosed in this behalf, the circumstances and the surroundings may have been such that it was impossible for her to see the same. *Lake Erie, etc., R. Co. v. Parrish* (1910), 46 Ind. App. 577, 93 N. E. 450. But even though it be conceded that she did see the automobile at the time, we cannot say that her conduct in attempting to cross the street was such as to prevent a recovery as a matter of law. To do so would be to hold substantially that a pedestrian attempting to cross the street where motor vehicles frequently pass and repass would

6. have to wait until the approaching vehicle had passed. This would certainly abridge the free use of the thoroughfare on the part of the pedestrian. Appellee was bound to exercise that degree of care that an ordinarily prudent person would exercise under the circumstances, but it was a question of fact for the jury as to whether she exercised such a degree of care.

From the time appellee left the sidewalk until she was struck by the automobile, it is disclosed by the answers to interrogatories that she did not look for the approach of vehicles, but this fact of itself can not preclude a recovery as a matter of law. In *Rump v. Woods* (1912), 50 Ind. App. 347, 98 N. E. 369, the court in condemning an instruction, which informed the jury that a foot passenger was not required to look or listen continuously for the approach of automobiles, held that, as a general rule, it must be left for the jury to say what acts constitute ordinary care and what acts do not, and further added: "It would have been error for the court to

say, as a matter of law, that ordinary care required appellee to look and listen constantly, and it was also error to instruct the jury that ordinary prudence did not require him to do so."

As a matter of law, a pedestrian who is lawfully using a public thoroughfare need not be constantly looking or listening to ascertain whether auto-

7. mobiles are approaching under the penalty that if he fails to do so and is injured his failure conclusively charges him with negligence. *Hennessey v. Taylor, supra*; *Gerhard v. Ford Motor Co.* (1909), 155 Mich. 618, 119 N. W. 904, 20 L. R. A. (N. S.) 232; *Robbins v. Springfield, etc., R. Co.* (1895), 165 Mass. 30, 42 N. E. 334. In *Green v. Eden, supra*, the court said: "Pedestrians passing over street crossings in a city are not required to exercise that degree of care and caution exacted of travelers at railroad crossings. * * * At railroad crossings the railroad has the right of way, while at street crossings all travelers, whether pedestrians or persons in vehicles have equal liberties and rights."

There is no such a want of harmony between the answers to interrogatories and the general verdict as to entitle appellant to judgment on the answers to

8. interrogatories notwithstanding the general verdict. Taking into consideration the entire situation of the parties and the place where the injury occurred it was for the jury to determine from all the facts and circumstances whether appellee, in attempting to cross the street at the time and in the manner she did, exercised that degree of care that an ordinarily prudent person would have exercised for his own safety. *Borg v. Spokane Toilet Supply Co.* (1908), 50 Wash. 204, 96 Pac. 1037, 19 L. R. A. (N. S.) 161, note; *Schoeller v. Metropolitan Express Co.* (1905), 108 App. Div. 226, 95 N. Y. Supp. 744; *Rattagliata v. Hubbell* (1894), 7 Misc. Rep. 103, 27

N. Y. Supp. 409; *Williams v. O'Keefe* (1862), 24 How. Pr. 16.

The conclusion we have reached necessitates an affirmance of the judgment. Judgment affirmed.

NOTE.—Reported in 111 N. E. 457. Rights and duties of pedestrians and of persons driving automobiles on highways, 4 Ann. Cas. 400; 13 Ann. Cas. 463; 21 Ann. Cas. 652; 108 Am. St. 215; notes, 25 L. R. A. (N. S.) 40; 38 L. R. A. (N. S.) 488; 1 L. R. A. (N. S.) 215; 3 L. R. A. (N. S.) 345; 20 L. R. A. (N. S.) 232; 51 L. R. A. (N. S.) 990; 28 Cyc 28, 37.

SIMS, ADMINISTRATOR v. RATCLIFF, ADMINISTRATOR.

[No. 9,136. Filed Nov. 4, 1915. Rehearing denied Feb. 4, 1916.
Transfer denied June 2, 1916.]

1. WILLS.—*Construction.—Intention of Testator.*—In construing a will it is the duty of the court to ascertain the intent of the testator from all the language used, and to give effect to all its provisions so far as possible under the law applicable thereto. p. 187.
2. WILLS.—*Construction.—Estate Created.*—Where the first sentence of an item of a will used the following language: "I will and bequeath all my personal property to my beloved wife, * * *, of which I may die the owner, she to have the use and enjoy the same for her support and maintenance, and to sell and dispose of said property for that purpose," held, that the words so used are sufficient, if unmodified, to make the devisee the absolute owner of the personal property therein devised. p. 187.
3. WILLS.—*Construction.—Words and Phrases.—Intention of Testator.*—In the construction of a will, before the court can ascribe to a word a meaning different from its usual import, it must first appear that such meaning is evidenced by the connection in which the word is used and that it is consistent with, and tends to effectuate, the intention of the testator as gleaned from the whole instrument. p. 188.
4. WILLS.—*Construction.—Estate Created.—"Suggest".*—Where an item of a will devised all the decedent's personal property to his wife "to enjoy the same for her support * * * and to sell * * * said property * * * for that purpose" and concluded with the words, "I suggest, however, that should any of my personal property remain intact or undisposed of at the time of her death that the same go" to others, held, that this item of the will bequeathed the testator's personal property to his widow, absolutely, and that the superadded words amount to nothing more than a recommendation which in no way changes or modifies the bequest. p. 191.

From Howard Circuit Court; *A. B. Kirkpatrick*, Special Judge.

Action by Abner H. Ratcliff, administrator of the estate of Gilbert Ratcliff, deceased, against George J. Sims, administrator of the estate of Clara F. E. Sims, deceased. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Bell, Kirkpatrick & Voorhis, for appellant.

James W. Cooper and Blacklidge, Wolf & Barnes, for appellee.

FELT, J.—This suit was brought by appellee against appellant to recover certain personal property, the right to which is asserted under the provisions of the will of Gilbert Ratcliff, deceased, by both litigants. The complaint shows that Gilbert Ratcliff died testate in March, 1909, and that his will was duly probated. Item No. 1 of the will provides for the payment of his debts and funeral expenses and, by item No. 5 he named his wife, Clara F. E. Ratcliff, executrix of his will. The other items are as follows:

“Item 2. I give and devise to my beloved wife, Clara F. E. Ratcliff, all the real estate of which I may die the owner, she to have and hold the same for and during her natural life. * * *

Item 3. I will and devise that, at the death of my beloved wife, Clara F. E. Ratcliff, that all of my said real estate be divided share and share alike between the nearest blood relation I may have living at that time and the nearest blood relation of my beloved wife at the time of her death; provided, that should my beloved wife remarry and bear a child or children, then in that case, it is my will that the said child or children of my said wife shall have and hold the fee of all my said real estate. Item 4. I will and bequeath all my personal property to my beloved wife, Clara F. E. Ratcliff, of which

I may die the owner, she to have the use and enjoy the same for her support and maintenance, and to sell and dispose of said property for that purpose. I suggest, however, that should any of said personal property remain intact or undisposed of at the time of her death that the same go, share and share alike, as provided for my real estate."

It is also averred that after the death of Gilbert Ratcliff his widow intermarried with George J. Sims; that no children were born to her; that thereafter she died leaving as her only heirs at law her husband George J. Sims and her father Robert O. Richards; that during her lifetime she had in her possession a large amount of personal property obtained from her former husband's estate, which property remained intact and undisposed of at the time of her death and is specifically described; that by the terms of the will of Gilbert Ratcliff, deceased, said property belongs to his estate and should be distributed according to the provisions of his will. Issues were formed on the complaint and the facts alleged are admitted except the claim to the personal property and the amount thereof in the possession of Mrs. Sims at the time of her death. The court found for the plaintiff and rendered judgment in substance that the administrator of the estate of Gilbert Ratcliff, deceased, recover of and from the estate of Clara F. E. Ratcliff, deceased, \$1,284.42, and ordered the amount paid by her administrator, the appellant, who was also her surviving husband. Errors are assigned on the overruling of the demurrer to the complaint, in overruling the motion of appellant to modify the judgment, and in overruling the motion for a new trial.

The questions presented all depend upon the construction of item No. 4 of the will of Gilbert

Ratcliff, deceased. Appellee contends that Clara F. E. Ratcliff was only given the use of the personal property for her support and maintenance during her lifetime and that the portion not needed and used for such purpose, and remaining intact at the time of her death, was disposed of by the will of Gilbert Ratcliff, and should be distributed in accordance with the provisions of item No. 3 thereof.

Appellant asserts that the devisee, Mrs. Ratcliff, afterwards Mrs. Sims, became the absolute owner of the personal property devised to her by item No. 4 of her deceased husband's will, and that the same is lawfully in his possession.

In construing the will, we are to ascertain the intent of the testator from all the language used, and to give effect to all its provisions so far

1. as possible under the law applicable thereto. The language of the first sentence of item No. 4 of the will is sufficient, if unmodified, to
2. make the devisee the absolute owner of the personal property therein described. *Fullenwider v. Watson* (1887), 113 Ind. 18, 19, 14 N. E. 571; *Van Gorder v. Smith* (1885), 99 Ind. 404, 409, 410; *Mulvane v. Rude* (1896), 146 Ind. 476, 481, 484, 45 N. E. 659; *Snodgrass v. Brandenburg* (1905), 164 Ind. 59, 62, 71 N. E. 137, 72 N. E. 1030; *John v. Bradbury* (1884), 97 Ind. 263, 266.

Appellee contends that the last part of item No. 4,—“I suggest, however, that should any of said personal property remain intact or undisposed of at the time of her death that the same go, share and share alike, as provided for my real estate”—when considered in connection with the other parts of the will, and particularly with item No. 3, shows that the testator did not intend to bequeath the personal property absolutely to his wife and did not vest title in her to such part of his personal property as was

intact and in her possession at the time of her death. In effect it is contended that the will, properly construed, shows that the testator intended to bequeath the use and benefit of such personal property to his wife and that any part thereof remaining intact and undisposed of by her at the time of her death was by him devised the same as his real estate.

Courts have gone to great length in ascribing meaning to words and phrases used in wills in order to carry into effect the intention of the

3. testator. But before any license is given to ascribe to a word a meaning different from its usual import, it must first appear that such meaning is evidenced by the connection in which the word is used and that it is consistent with and tends to effectuate the intention of the testator as gleaned from the whole instrument.

The word "suggest", as generally used and understood, is insufficient to change the character of the bequest made in the first part of item No. 4. Webster defines the word as meaning: "To introduce indirectly to the thought—to propose with diffidence or modesty." The Century dictionary defines it as follows: "To place before another's mind problematically; hint; intimate; to introduce to another's mind by the prompting of an indirect or mediate association."

In devising his real estate in items Nos. 2 and 3, the testator used apt language. The same is true of the language employed in the first part of item No. 4 in disposing of his personal property. If the testator desired only to make a recommendation to his wife as to how she should dispose of the personal property he had given her, in case any of it should remain in her possession at the time of her death, the word "suggest" was appropriate for that purpose and the will contains nothing inconsistent with such meaning.

In *Williams v. Committee, etc.* (1901), 92 Md. 497, 48 Atl. 930, 54 L. R. A. 427, the Supreme Court of Maryland considered a case in which a bequest was made to a church, to which language was added as follows: "And I suggest, if the spire of said church property be unfinished at the time of my death, that the funds received * * * be used for the purpose of completing the same; and further suggests, if the spire is finished, that the funds, or what may be left * * * be invested by the said committee and the income devoted to the work at the church mission known as 'William's Chapel', but if the work has been abandoned then said income to be used for the relief of the poor of said church." It was contended that the church did not take the property absolutely; that the committee had not used the fund as directed; that the trust was null and void and the property was held by the committee "for the benefit of those who are next of kin of the testator." The court held "that the legacy to the committee of the Baptist church is absolute, and not subject to any trust", and among other things said: "Can the word 'suggest,' when used in this connection, without qualifying or explanatory words, be regarded as a precatory word, sufficient to create a trust, as to property previously given absolutely? We have been cited to no case, and have found none, where it has been so held. A suggestion alone, without other words or circumstances to affect the ordinary meaning, is a mere placing before another a matter for consideration, and under ordinary circumstances in nowise carries with it an expression of desire, will or entreaty, and here it seems to amount to no more than this. The testator gives the whole interest in the fund absolutely to the church; he places no restrictions upon it as to its use, but he

does mention several matters for consideration. He 'suggests' that a proper disposition would be to finish the spire, or apply the income to the chapel, not as a requirement upon the committee, but as a matter for its consideration. So, also, in respect to the relief of the poor, there is no limitation imposed upon the committee, but a mere suggestion as to what would be a proper use of the fund. There is nothing in the word 'suggest' either in its meaning as ordinarily employed or as affected by the context of the will, that can be regarded as expressive of confidence, or belief, or desire, or hope, or will, or as the equivalent of a word of entreaty or recommendation."

In this case the devisee was given the personal property with power to sell and dispose of the same. The added power of disposition does not change the bequest and does not aid us in ascribing to the word "suggest" the meaning necessary to show that the property in question was not bequeathed to Mrs. Rateliff, absolutely, but was devised by the testator to the parties to whom he gave his real estate, subject to the life estate therein of his widow. The sentence in which the word "suggest" is used recognizes title in the devisee and calls her attention to the fact that the testator favored such disposition of the personal property, if any, remaining at her death, as he had made of his real estate, but it does not destroy the devise to his widow or show that the testator had himself undertaken to dispose of the property. As supporting this conclusion, we cite: *Fullenwider v. Watson*, *supra*; *Van Gorder v. Smith*, *supra*; *Snodgrass v. Brandenburg*, *supra*, p. 65; *Mulvane v. Rude*, *supra*, pp. 483, 485.

We therefore conclude that by item No. 4 of the testator's will he bequeathed his personal property

to his widow, absolutely, and that the super-added words amount to nothing more than a recom-

4. mendation which in no way changes or modifies the bequest.

The judgment is therefore reversed with instructions to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 110 N. E. 122. See under (2), (4) 40 Cyc 1612; (3) 40 Cyc 1396. Clauses of doubtful meaning purporting to cut down clear demises or bequests, 3 Ann. Cas. 615; 10 Ann. Cas. 176; 11 Ann. Cas. 470.

CITY OF INDIANAPOLIS v. PELL.

[No. 8,798. Filed January 11, 1916. Rehearing denied April 25, 1916. Transfer denied June 2, 1916.]

1. **APPEAL.—Scope of Review.—Evidence.**—On appeal, the error urged by appellant being the action of the trial court in giving an instruction which took the question of contributory negligence away from the jury, the court can consider only the evidence that tends to show contributory negligence, as it is never the province of the court to weigh conflicting evidence. p. 194.
2. **NEGLIGENCE.—Defect in Street.—Personal Injuries.—Contributory Negligence.—Evidence.**—Where the evidence was that the plaintiff who was fifteen years of age, was familiar with the surroundings of the locality where she was injured; that she was struck and hurt by an automobile traveling at a speed somewhat less than eight miles per hour; that one who accompanied her escaped injury; that the injury was inflicted some distance from where plaintiff first observed the approach of the machine; and there was some evidence tending to show that she ran around and in front of the machine, held, that there was some evidence from which contributory negligence on the part of the plaintiff might reasonably have been inferred, and it was erroneous for the trial court to give an instruction taking away from the consideration of the jury such question of contributory negligence. p. 195.
3. **NEGLIGENCE.—Contributory Negligence.—Degree of Care Required.**—One confronted by a sudden peril, occasioned by the negligence of another, is not required to exercise that degree of care which a person is obliged to exercise under other circumstances, but is only required to act with that degree of care which an ordinarily prudent person would have exercised under like conditions. p. 195.

4. **APPEAL.**—*Review.*—*Record.*—Where counsel for the defendant, in the opening statement of facts to the jury, said that there was no question of contributory negligence in the issues, although such a defense was subsequently interposed, such statement, not having been presented in any way by the record, can not be considered on appeal, as the cause must be tried by the record alone. p. 195.

From Boone Circuit Court; *Willett H. Parr*, Judge.

Action by Pearl Pell, by her next friend, Charles Pell, against the City of Indianapolis. From a judgment for plaintiff, the defendant appeals. *Reversed.*

William A. Pickens, Fred E. Barrett, Roy W. Adney and J. W. Hornaday, for appellant.

Wm. S. Canfield, Walter L. Carey, Thomas J. Karnes, Samuel R. Artman and William H. Smith, for appellee.

SHEA, J.—Appellee, by her next friend Charles Pell, brought this action against appellant to recover damages for personal injuries alleged to have been caused by a defect in one of the streets of appellant city. The cause was taken on a change of venue to the Boone Circuit Court, where a trial resulted in a verdict and judgment in favor of appellee for \$1,500.

It is assigned that the court erred in overruling appellant's motion for a new trial. The sole alleged error is the giving of instruction No. 1 by the court on its own motion, in which the question of contributory negligence on the part of appellee was taken from the jury.

It is insisted on behalf of appellant, and not controverted by appellee, that if there was evidence introduced in the case from which the jury might reasonably have inferred contributory negligence on the part of appellee, the instruction was erroneous. If, on the other hand, there was no such evidence, no error was committed.

It is disclosed by the evidence, in substance, that appellee was injured while at the intersection of South Meridian street, running north and south, and Adler street, running east and west, in the city of Indianapolis. At the time of the accident there was a street railway track in Meridian street, from which a spur or "Y" extended east about one hundred feet into Adler street. There was a cement sidewalk ten feet wide on the east side of Meridian street adjoining the property line, and a similar sidewalk five feet six inches wide on the north side of Adler street adjoining the property line. Immediately joining, and flush with these two sidewalks, was a frame building known as Brady's store. At a point a short distance east of the property line of South Meridian street, and immediately north of the north rail of the "Y" in Adler street was a dangerous hole, about eight to ten inches deep, two and one-half to three feet long, and one and one-half to two feet wide, which had existed for fifteen years, worse at some times than others, especially bad in wet weather, and of which appellant's superintendent of streets had actual notice for four years prior to appellee's injury. On the afternoon of June 21, 1912, John W. Berry was driving an auto truck west in Adler street on the north side of the north rail of the "Y," intending to turn south into Meridian street, on the east side of the street car track. When he attempted to turn south, the front wheel dropped into the hole, the steering gear was torn from his hold, and the truck followed the curve of the "Y" to the northwest over the cement sidewalks on the north side of Adler street and the east side of Meridian street, the wheel of the truck coming within thirteen inches of the building. Appellee at that time, in company with one Gertrude Greenwood, was walking south

on the east sidewalk of Meridian street, returning home from work about 4:30 p. m. Just as they stepped past the corner of the building at the northeast corner of the intersection of Meridian and Adler streets, the truck came upon them without any warning. Appellee attempted to escape it, but was struck and run over.

In determining this question, the court should consider only the evidence, if any, that tended to show the contributory negligence of appellee,

1. and should give no consideration to evidence that tended to show freedom from contributory negligence, as it is never the province of this court to weight conflicting evidence.

It is shown in evidence that appellee was fifteen years of age, and was familiar with the situation and surroundings of the place where she met with the injury; that the automobile was traveling at a speed of about eight miles per hour at the time it went into the hole in the street. It may be reasonably inferred that its speed was somewhat retarded by contact with the railroad tracks and the curb of the sidewalk. It was also shown that the young lady that accompanied appellee wholly escaped injury. There is evidence tending to show that appellee's injury was inflicted while she was some distance from the sidewalk in Meridian street, and some distance from where she first observed the approach of the machine. There is some evidence tending to show that she ran around and in front of the machine, and it is argued that if she had taken one step backward, or had gone in any other direction from the one in which she did go, she would have escaped injury.

It is the judgment of this court that there is some evidence from which contributory negligence

upon the part of appellee might be reasonably inferred.

Lyons v. City of New Albany (1913), 54 Ind.

2. App. 416, 433, 103 N. E. 20; *Cleveland, etc., R. Co. v. Hadley* (1908), 170 Ind. 204, 82 N. E. 1025, 84 N. E. 14, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1; *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413, 73 N. E. 899; *Pittsburgh, etc., R. Co. v. Cozatt* (1907), 39 Ind. App. 682, 690, 79 N. E. 534.

It is too well settled to be argued that when a person is confronted with sudden peril, occasioned by the negligence of another, he is not required

3. to exercise that degree of care which a person is obliged to exercise under other circumstances, but is only required to act with that degree of care which an ordinarily prudent person would have exercised under like conditions. But as to whether appellee in this case acted with such care was a question that should have been submitted to the jury under proper instructions. *McIntyre v. Orner* (1906), 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.), 1130, 117 Am. St. 359, 8 Ann. Cas. 1087; *Indiana Union Traction Co. v. Love* (1913), 180 Ind. 442; 99 N. E. 1005; *Louisville, etc., Traction Co. v. Worral* (1909), 44 Ind. App. 480, 86 N. E. 78; Thompson, Negligence §§196, 197, 2927.

It was suggested in the oral argument that if error could be predicated upon the giving of the challenged instruction, it was invited, or waived, by appellant's learned counsel, who tried the cause in the court below, inasmuch as it was stated in argument that counsel in the opening statement of facts to the jury said, among other things,

4. that there was no question of contributory negligence in the issues. However, the record does not present this question, as the instruction itself makes no reference to counsel's admissions; neither does it show that counsel's statements were

copied into the record. However much this court might be inclined to hold counsel and parties to their admissions made in open court, under the well settled rule in this court, the cause must be tried by the record and not otherwise. Elliott, App. Proc. §186. For the error in giving the instruction the judgment is reversed, and a new trial ordered.

NOTE.—Reported in 111 N. E. 22. Rights and duties of pedestrians and of persons driving automobiles in highways, 4 Ann. Cas. 400, 13 Ann. Cas. 463; 21 Ann. Cas. 652. Liability of municipal corporations for defective streets, 103 Am. St. 257. See under (2) 28 Cyc 49; (3) 29 Cyc 521; (4) 4 C. J. 520, 532; 3 Cyc 155, 164.

NORDYKE & MARMON COMPANY v. HILBORG.

[No. 8,735. Filed December 16, 1915. Rehearing denied February 18, 1916. Transfer denied June 2, 1916.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Fellow Servant.—Contributory Negligence.—Statute.—Validity.*—Section 8020a Burns 1914, Acts 1911 p. 145, concerning the liability of employers of five or more persons for personal injuries received by employes, and which statute abolishes the fellow servant doctrine and the defenses of contributory negligence and assumption of risk in many cases, is constitutional. p. 201.
2. MASTER AND SERVANT.—*Injuries to Servant.—Fellow Servant.—Rule.—Sufficiency of Complaint.*—Under §8020a et seq. Burns 1914, Acts 1911 p. 145, which provides that any person, firm or corporation employing five or more persons shall be liable for an injury which results in whole or in part from the negligence of an employer, or his or its servants, and for an injury which results from defects, mismanagement or insufficiency due to his, its or their carelessness, negligence, fault or omission of duty, held, that a complaint, alleging that the employer knowingly and negligently continued in his employ a helper for the plaintiff after he had notified such employer of the inefficiency of such helper, and that plaintiff was injured by the negligence of the employer and of the helper, a fellow servant, states a cause of action under the statute. pp. 203, 204.
3. MASTER AND SERVANT.—*Injuries to Servant.—Fellow Servant.—Degree of Care.*—Under the common law a master is bound not to knowingly or negligently employ any but careful and competent servants and where he knowingly or negligently employs or keeps in his employment an incompetent or negligent servant, he is liable to one of his servants that is injured by the negligence of such

- employee, unless the incompetency or negligence of such servant was known to the injured servant or could have been known to him by the exercise of ordinary care and that, notwithstanding such knowledge, he voluntarily continued in the employment. p. 203.
4. **MASTER AND SERVANT.—Injuries to Servant.—Assumption of Risk.—Sufficiency of Complaint.**—Where the master and servant both have knowledge of the incompetency of a fellow servant, and the master induces the servant to remain in his employ by a promise to replace such fellow servant by a competent and careful employee, and the complaining servant, by virtue of such promise, remains in such employment for a time reasonably sufficient to enable the master to secure such careful and competent fellow servant, he will not assume the risk of the incompetency or negligence of such negligent fellow servant unless the hazard of so continuing was so great that an ordinarily prudent person would not have so continued under such circumstances; hence, a complaint states a cause of action under the common law, where it alleges that plaintiff's helper was grossly negligent and inefficient; that he had notified his employer of such inefficiency and was induced to continue in his employer's service by a promise that he would be furnished with a capable helper, and that shortly thereafter the injury complained of was caused by the negligence of such incompetent fellow servant. pp. 203, 204.
5. **PLEADING.—Complaint.—Election.**—Where a servant was injured by the negligence of a fellow servant and the facts in the complaint state a cause of action under both an Employer's Liability Statute and the common law, the injured servant may proceed to trial without electing whether he will try the case on the theory of a suit under the statute or as a common-law action, since both actions sound in tort and are, under the Indiana Code, triable without such election. p. 204.
6. **PLEADING.—Complaint.—Motion to Separate.**—Where, in one paragraph of a complaint, plaintiff states two causes of action, one under the statute and one under the common law, a motion to separate the causes into separate paragraphs should be sustained. However, it is not reversible error for the trial court to overrule such a motion. p. 205.
7. **TRIAL.—Verdict.—Special Interrogatories.**—In an action for damages, predicated on the negligence of the master in employing an incompetent fellow servant, there was a general verdict for the plaintiff, who was injured while he was handling metal on the anvil of a steam hammer. Answers to special interrogatories submitted disclosed that the plaintiff was a mature man, possessed of all his faculties and understood the operation of the hammer; that he could have handled the metal, which he was placing on the anvil, with tongs provided for his use, and thus avoided the injury; that he could have safely placed the metal on the anvil either by using the tongs or both hands, and there was no reason why he should not have done so; that the injury would have been avoided had he

not improperly placed his hand on top of the collar of the anvil to adjust it; that he placed the piece of metal on the anvil by the use of the left hand alone, with his fingers over the top of the collar; that it was sufficiently light where he was working; that his helper knew how to operate the hammer and was ordinarily a competent and careful operator. *Held*, that the answers are not in irreconcilable conflict with the general verdict and that the trial court did not err in overruling defendant's motion for a judgment on the answers to interrogatories, as the general verdict, under the rules of practice, found the plaintiff free from contributory negligence and such answers fail to show, as a matter of law, that a prudent person, in the exercise of ordinary care, would not have undertaken to do the work in the way selected by the plaintiff. p. 207.

From Marion Circuit Court; *Charles Remster*, Judge.

Action by John Hilborg against the Nordyke & Marmon Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Elmer E. Stevenson, for appellant.

Muter M. Bachelder and *Harold K. Bachelder*, for appellee.

FELT, J.—This is a suit by appellee against appellant for damages for personal injuries. From a judgment in appellee's favor for \$3,600, appellant appeals. The errors relied on for reversal allege that the court erred: (1) In overruling the demurrer to appellee's complaint; (2) in overruling appellant's motion to require appellee before the commencement of the trial to elect whether he would try the case on the theory of a suit under the statute or as a common-law action for damages; (3) in overruling appellant's motion for judgment on the answers of the jury to the interrogatories notwithstanding the general verdict; (4) in overruling appellant's motion for a new trial.

Omitting formal averments about which there is no contention, the complaint, in substance, avers that on January 4, 1912, and prior thereto, appellant

was a corporation engaged in the manufacture of automobiles and milling machinery and in so doing had in its employ more than five persons; that it operated a blacksmithing department as a part of its business in which department it employed more than five men; that appellant operated a large steam hammer which consisted of a large die or anvil, the top of which was about six inches wide and eight inches long; that the hammer was made of steel and could be moved up and down on a piston by steam power and let fall a distance of three feet to the anvil and was so used in forging pieces of metal; that it required two persons to operate the hammer, one to handle the metal on the anvil so as to secure the desired results and the other to turn on and off the steam power by which the hammer was operated; that it required all the time and attention of the one that handled the metal to properly adjust and keep the same on the anvil and it was the duty of the other operator to turn the steam on or off in accordance with signals given him by the person that placed the metal on the die; that, in placing such metal pieces on the die, it was necessary for the one that did the work to place his hand on the top of the die in various positions for the purpose of properly adjusting the metal thereon; that on said day appellee was employed by appellant and it was his duty to place metal pieces on the die to be operated on by the hammer; that appellant then and there had in its employ as a helper, a boy nineteen years of age, whose duty it was to turn on and off the steam power in raising and lowering the hammer; that such services required a careful and prudent person that would attend strictly to his work; that said helper was very negligent, inexperienced and careless; that he was notoriously reckless and inefficient all of which became known to appellant;

that he paid no attention to the signals given him, though he had been in appellant's employment for some time; that on account of his recklessness and heedlessness appellant shifted him about to different positions in the factory; that appellant knew it was dangerous for any person to work with him; "that on or about the day that this plaintiff was injured, and prior thereto, to wit: the 4th day of January, 1912," appellee complained to appellant and notified it that the helper was very reckless, careless and negligent and inattentive to his work and that it was dangerous to work with him and that appellant must get rid of him and provide appellee with some one who was more careful and prudent; that thereupon appellant assured appellee that it knew that the helper was reckless and dangerous, that it had no one to take his place but, if appellee would go ahead and do the best he could, so soon as it could secure some other person to take his place it would be done; that this would be done in a short time and it promised to get some one in three or four days. Whereupon appellee continued to work with the helper, operating the machine as aforesaid, and in so doing relied on the promise of appellant; that on January 4, 1912, while working as aforesaid in pursuance of the aforesaid promise to secure a careful and competent helper, and while in the line of his duty appellee was arranging a piece of metal on the die and had his left hand thereon in such position that should the power be turned on, the hammer would fall upon the same; that while his hand was in such position the helper negligently, carelessly and heedlessly turned the power on and caused the hammer to fall violently on appellee's hand and seriously and permanently injured the same; that appellant was negligent in keeping the helper in its employ with knowledge of his carelessness and negligence,

and in failing to provide a careful and competent helper for appellee; "that by virtue of said injury, the defendant's negligence and the negligence of said helper" appellant was injured; "that said injuries were all caused by virtue of the negligence and carelessness of the defendant as herein alleged"; that appellee was free from any contributory negligence on his part. Appellant's demurrer was accompanied by a memorandum which in substance states that: (1) The facts alleged do not show any negligence of appellant which was the proximate cause of appellee's injury; (2) the facts pleaded show that appellee knew of the dangers of his employment and assumed the risk; (3) the conditions and dangers of appellee's employment were open and obvious and in doing the things alleged he was guilty of contributory negligence; (4) appellee relied on no act or failure of appellant to his injury; (5) the complaint does not state a cause of action under the Employer's Liability Act of 1911 for: (a) While it is alleged that more than five men were employed, it does not show in what respect the statute was violated; (b) the act is unconstitutional.

The constitutionality of the act of 1911 (Acts 1911 p. 145, §8020a Burns 1914), to which reference is made, has been settled adversely to appel-

1. lant's contention, and therefore we proceed to consider the other questions presented.

Vandalia R. Co. v. Stillwell (1914), 181 Ind. 267, 104 N. E. 289; *Kingan & Co. v. Clements* (1916), 184 Ind. 213, 110 N. E. 66.

Appellant also contends that the complaint is insufficient to state a cause of action under the statute because it fails to show in what respect, if at all, the statute was violated. The statute *supra*, §8020a *et seq.* Burns 1914 provides: "That any person, firm or corporation while engaged in business, trade

or commerce within this state, and employing * * * five or more persons shall be liable and respond in damages to any person suffering an injury while in the employ of such * * * corporation, * * * where such injury * * * resulted in whole or in part from the negligence of such employer or his, its or their agents, servants, employes or officers, or by reason of any defects, mismanagement or insufficiency, due to his, its or their carelessness, negligence, fault or omission of duty."

In *Vandalia Coal Co. v. Stillwell*, *supra*, 270, our supreme court says: "Section 1 makes its provisions applicable only to employers of five or more persons, and abrogates the fellow servant rule, but restricts liability to *negligence* * * * in whole or in part producing the injury, or death." In the recent case of *Chicago, etc., R. Co. v. Mitchell* (1916), 184 Ind. 588, the Supreme Court in an opinion by Morris, C. J. in speaking of the same act says: "The effect of this section is to abrogate the assumed risk rule in so far as it applies to the particular risk of injury by a fellow servant."

The gist of the complaint is that appellee's helper was notoriously negligent and inefficient in the discharge of his duties; that appellant knew thereof before appellee's injury and thereafter negligently continued him in his employ; that appellee was injured because of appellant's negligence and the negligence of its helper. The statute provides a liability for: (1) An injury which results in whole or in part from the negligence of an employer or his or its servants; and (2) for an injury which results from defects, mismanagement or insufficiency due to his, its or their carelessness, negligence, fault or omission of duty. The complaint shows that prior

to, and on the day of; his injury appellee notified appellant of the negligence and in-

2. efficiency of its helper and asked that some capable person be put in his place, and that appellant induced appellee to continue in itsem-

3. ploy by a promise to secure for him a competent assistant. The complaint also shows that appellee's injury was caused by the negligence of his helper, a fellow servant. Independent of the statute, a master is bound not to knowingly or negligently employ any but careful and competent servants, and where he negligently or knowingly employs an incompetent or negligent servant or keeps in his employ a careless or incompetent servant, after notice of such incompetency or carelessness, he is liable to one of his servants that is injured by the negligence of such careless or incompetent servant, unless the facts show that the incompetency or negligence of such fellow-servant was known to the injured servant, or could have been known to him by the exercise of ordinary care prior to the time he received his injury, and that notwithstanding such knowledge he voluntarily continued in the employment. Where, however, the master and servant both have knowledge of the incompetency or carelessness of such fellow servant and the master,

- by the promise to secure a careful and competent servant to take the place of such negligent or incompetent fellow-servant, induces such servant to continue in such employment, with such negligent or incompetent fellow servant, the complaining servant by virtue of such promise may continue in such employment for a period of time reasonably sufficient for the master to secure such careful and competent fellow servant, and will not during such reasonable time assume the risk of the incompetency or negligence of such fellow

servant. If, however, the hazard of so continuing is so great and apparent that an ordinarily prudent person would not have continued in the employment under such circumstances, notwithstanding such promise of the master, a servant injured by reason of such hazard may not recover. *Lake Shore, etc., R. Co. v. Stupak* (1890), 123 Ind. 210, 222, 223, 23 N. E. 246; *Id.* (1886), 108 Ind. 1, 4, 6, 8 N. E. 630; *Indianapolis, etc., Switch Co. v. Boyle* (1897), 18 Ind. App. 169, 172, 47 N. E. 690; *McFarlan Carriage Co. v. Potter* (1899), 153 Ind. 107, 115, 53 N. E. 465; *Indianapolis, etc., R. Co. v. Foreman* (1904), 162 Ind. 85, 92, 93, 69 N. E. 669, 102 Am. St. 185; *Francis v. Kansas City, etc., R. Co.* (1894), 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; *Curran v. A. H. Stange Co.* (1898), 98 Wis. 598, 74 N. W. 377, 379; *Maitland v. Gilbert Paper Co.* (1897), 97 Wis. 476, 72 N. W. 1124, 65 Am. St. 137, 140; *Poirer v. Carroll* (1883), 35 La. Ann. 699.

The complaint therefore clearly states a cause

2. of action under the common law, and is also good under the statute, for §1 of the act of 1911, *supra*, as construed by the Supreme
4. Court "abrogates the assumed risk rule in so far as it applies to the particular risk of injury by a fellow servant."

The court did not err in overruling appellant's motion to require appellee to elect to try his cause of action either on the theory of a common-law action for damages or as a suit for damages brought under the Employer's Liability Act. As already pointed out in this opinion the facts alleged brought the case within the provisions of the statute and were also sufficient to state a cause of action at common law. Both actions sound in tort

5. and, under our practice authorized by the code, appellee had the right to proceed to trial without such election. If appellant had any

right based on the dual nature of the complaint, it should have moved to separate the two causes of action and have them stated in separate paragraphs. This was not done. The trial court should sustain a motion to separate into separate paragraphs a complaint stating more than one cause of

6. action but, notwithstanding this fact, it has been held that it is not reversible error to overrule such a motion, and it necessarily follows that the trial court did not err in overruling appellant's motion as above shown. *Wabash, etc., R. Co. v. Rooker* (1883), 90 Ind. 581, 582; *Pierce v. Walton* (1898), 20 Ind. App. 66, 80, 50 N. E. 309; *Smiley v. Deweese* (1891), 1 Ind. App. 211, 27 N. E. 505; *Shaw v. Ayers* (1897), 17 Ind. App. 614, 618, 47 N. E. 235; *Snyder v. Snyder* (1865), 25 Ind. 399, 401; 1 Works' Practice (3d ed.) 280.

It is next insisted that the court erred in overruling appellant's motion for judgment on the answers of the jury to the interrogatories notwithstanding the general verdict. The answers in substance show that appellee was a mature man, possessed of all his faculties and experienced in the work he was doing when injured; that he knew how the hammer was operated; that he could have handled the metal with tongs provided for his use and avoided the injury; that he could have safely placed the metal on the anvil by using both hands or by using the tongs, and there was no reason why he should not have done so on the occasion of his injury; that he would not have been injured if he had not placed his hand on top of the iron collar, and it was not proper for him to so place his hand in adjusting the collar on the anvil; that he picked up the piece of metal with his left hand and placed the same on the anvil with his fingers over the top of the collar; that it was sufficiently light where he was working;

that his helper knew how to operate the hammer and was ordinarily a competent and careful operator. Appellant contends that the answers show conclusively that it was guilty of no negligence which was the proximate cause of appellee's injury; that appellee assumed the risk that resulted in his injury; that appellee was guilty of contributory negligence in placing the metal on the anvil by the use of one hand on the top of the piece of metal; that there were two absolutely safe ways of doing the work, one by the use of the tongs and the other by employing both hands, and that appellee voluntarily chose another, an unsafe way, that of using one hand on top of the metal.

Appellant concedes that in passing on this motion the general verdict is viewed as finding every issuable fact in favor of the prevailing party, and that we may consider only the issues formed by the pleadings, the answers to the interrogatories and the general verdict; that the general verdict will prevail unless the answers are in irreconcilable conflict with the general verdict. In the light of these rules what we have said and the authorities cited, in passing on the sufficiency of the complaint, show the first two grounds of appellant's contention to be untenable. Whether appellee is conclusively shown to have been guilty of contributory negligence in choosing to place the metal on the anvil in a way accompanied by danger, when two other safe ways of doing the work were available to him, must be determined by ascertaining whether the way in which he did the work was so openly and apparently hazardous that an ordinarily prudent person in the exercise of ordinary care for his own safety would not have undertaken to do the work in that manner. Unless we can say as a matter of law that the facts found by the answers to the interrogatories show that such a person in the exercise of ordinary care for his own safety would not have undertaken to do

the work in the way appellee undertook to do it, then the general verdict must prevail. The general verdict finds appellee free from contributory negligence and the answers fall short of showing that a prudent person in the exercise of ordinary

7. care would not have undertaken to do the work in the way selected by appellee. The answers are not therefore in irreconcilable conflict with the general verdict and the court did not err in overruling appellant's motion. *Jenney Electric Mfg. Co. v. Flannery* (1913), 53 Ind. App. 397, 408, 410, 98 N. E. 424, and cases cited.

Complaint is made of the giving of instructions Nos. 15 and 16 by the court. We have considered all the instructions and find no reversible error based on the instructions considered from the standpoint of a common-law action for damages. Since we have held the complaint good under the statute it is apparent that appellant has no cause to complain of the instructions given, many of which were tendered by it. The instructions given, when considered as a whole, were, at least, as favorable to appellant as the law warrants, and no reversible error is shown by the giving of the instructions of which complaint is made. There is evidence tending to support every material averment of the complaint.

No prejudicial error against appellant has been shown. Every right of appellant in making its defense was given full recognition by the trial court and the record discloses no intervening error that warrants a reversal. Judgment affirmed.

NOTE.—Reported in 110 N. E. 684. Statutes abrogating fellow servant doctrine, constitutionality, 10 Ann. Cas. 1113; 19 Ann. Cas. 196; notes, 12 L. R. A. (N. S.) 1040; 47 L. R. A. (N. S.) 84. Servant remaining at work after master's promise to remove incompetent fellow servant, as assumption of risk or contributory negligence, 11 Ann. Cas. 625. See, also, under (1) 26 Cyc 1079, 1180; (2) 26 Cyc 1360; (3) 26 Cyc 1293; (4) 26 Cyc 1209; (5) 31 Cyc 651; (6) 31 Cyc 653; (7) 26 Cyc 1513.

TOLEDO, ST. LOUIS & WESTERN RAILROAD CO. v.
MILNER, ET AL.

[No. 8,771. Filed December 15, 1915. Rehearing denied March 10, 1916. Transfer denied June 2, 1916.]

1. **APPEAL.**—*Objection to Sufficiency of Complaint.*—*Waiver.*—*Statute.*—Since the amendment of §348 Burns 1908, §343 R. S. 1881, by Acts 1911 p. 415, the objection that the complaint does not state facts sufficient to constitute a cause of action is waived unless taken by answer or demurrer. p. 212.
2. **COMMERCE.**—*Interstate Shipments.*—*State Legislation.*—Shipments which are interstate commerce are governed by federal statutes which supersede state legislation thereon. p. 213.
3. **CARRIERS.**—*Interstate Shipments.*—*Option of Rates.*—*Effect.*—*Invalid Shipping Contract.*—Under the federal law regulating interstate shipments, there may be at least two rates that are binding on the parties, if they have been filed with the Interstate Commerce Commission and duly approved and published, the shipper having the option of choosing the rate under which he will ship, and, when such option is exercised, the right of the shipper to damages, if any, may be determined in accordance with any reasonable stipulations accompanying the rate under which the shipment is made, but the carrier can not by contract relieve itself from liability for actionable negligence. p. 213.
4. **CARRIERS.**—*Interstate Shipment.*—*Invalid Shipping Contract.*—*Common-Law Liability.*—When an interstate shipper of freight is compelled to ship under a special contract restricting the liability of the carrier, or not at all, and is denied the privilege of paying the higher authorized rate and shipping under such unrestricted common-law liability, as is authorized by the federal statute, such contract is not fairly or freely entered into and it affords the carrier no protection from its common-law liability, since it is invalid. p. 216.
5. **CARRIERS.**—*Interstate Shipment.*—*Common-Law Liability.*—*Estoppel to Deny.*—Under the provisions of the Interstate Commerce Act of February 4, 1887, §22, 24 Stat. 387 (§8595 U. S. Comp. St. 1913), declaring that nothing in the act shall abridge or alter the remedies existing at common law or by statute, and that the provisions of the act are an addition thereto and under the Carmack Amendment (Act June 29, 1906, §7, 34 Stat. 595, §8592 U. S. Comp. St. 1913), providing that it was not the purport of the act to deprive any holder of a receipt or bill of any right under existing law, if a carrier, by its own wrongful act, prevented the shipper from exercising his option as to rates and shipping under a contract charging such carrier with full common-law liability, the case is thus taken outside of the federal statute, and

the carrier can not deny such shipper his common-law remedy for damages sustained by failure to safely transport and deliver freight. p. 217.

6. **CARRIERS.**—*Interstate Shipment.*—*Special Contract.*—*Burden of Proof.*—Where a carrier interposes as a defense a special contract limiting its liability, or showing nonliability, the burden is on it to show a valid contract and to establish the reasonableness of the provision on which it relies and, if there is no valid contract, such defense is not available. p. 217.

7. **APPEAL.**—*Review.*—*Sufficiency of Evidence to Support Verdict.*—Where there was a general verdict for plaintiffs, who were interstate shippers, the complaint averred that the defendant, a common carrier, had been negligent in delaying the shipment of a consignment of live stock, such delay resulting in loss to plaintiffs, and the defendants set up as a defense that the consignment had been shipped under a special contract limiting the liability of the carrier, such contract providing for the lower of two freight rates, such rate having been promulgated in compliance with the provisions of the federal interstate commerce law. Defendants also answered that plaintiffs had failed to present their verified claims for damages within the time stipulated in the contract. There was evidence tending to prove, though not conclusively, that plaintiffs were compelled to sign the special contract set up as a defense in order to secure the shipment of their freight; that defendant's agent would not move the cars until such contract was signed; and that the plaintiffs were not given the right to make their option as to which of the two published rates they ship under. *Held*, that, as the general verdict finds every material fact in favor of the plaintiffs, and there is some evidence from which the inferences necessary to support the verdict might reasonably have been drawn, the verdict will not be disturbed on the ground that it is not sustained by the evidence, although other and different inferences of fact might reasonably have been drawn therefrom. p. 218.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by George D. Milner and Willard E. Milner, partners, against the Toledo, St. Louis & Western Railroad Company. From a judgment for plaintiffs, the defendant appeals. *Affirmed*.

Charles G. Guenter, Braden Clark, Geddes Van Brunt, Clarence Brown and Charles A. Schmettau, for appellant.

William Robison, for appellees.

FELT, P. J.—This is an action for damages alleged to have been sustained by appellees in connection with nine separate interstate shipments of cattle, hogs and sheep. Seven of the shipments were from Frankfort, Indiana, to Pittsburgh, Pennsylvania, and the other two were from Frankfort, Indiana, to Buffalo, New York. The suit is based on the common-law duty of appellant to safely carry and deliver the live stock to the designated place. The complaint alleges negligence of appellant in delaying the shipments and in failing to transport the live stock with reasonable diligence by reason of which negligence some of appellees' live stock died en route; that there was extra shrinkage on other stock; that the animals had a stale appearance by reason of being kept so long on the road, and that there was a decline in the market price between the time the stock should have arrived and the time it did arrive, by reason of all of which appellees were damaged.

The complaint consists of nine paragraphs, each of which covers a different interstate shipment, but they are in all essentials the same. In each it is alleged that appellees were partners engaged in buying and shipping live stock; that appellant owned and operated a railroad from Toledo, Ohio, to East St. Louis, Illinois; that it was a common carrier of freight and passengers for hire and engaged in interstate commerce, and held itself out as such common carrier from Frankfort, Indiana, to Pittsburgh, Pennsylvania and Buffalo, New York.

To each of such paragraphs appellant filed an answer in two paragraphs, the first of which is a general denial, and the second, an affirmative paragraph in which appellant admits that it received shipments of live stock from appellees to be carried to Pittsburgh, Pennsylvania, or Buffalo,

New York, as the case might be, but it says that such live stock was delivered by appellees and received by appellant under a special written contract duly entered into by the parties; that on the dates of the respective shipments the rate charged appellees for shipping live stock from Frankfort, Indiana, to said cities was a lower rate than that charged without a special contract and without limitation of appellant's liability; that appellant maintained two rates on live stock between the points named; that the rate, where no special contract limiting its liability was executed, was ten percent. higher than that where a shipment was made under special contract; that both rates were duly filed with the Interstate Commerce Commission and published; that the same were the only lawful established rates for such shipments and were reasonable; that appellees knew of the above rates and, for the purpose of obtaining the lower rate, they made and entered into a special contract, a copy of which is filed with such answer; that appellees could have shipped the stock at the higher rate without executing any special contract and without limitation of appellant's liability; that they had full opportunity to do so; that appellant has fully complied with all the terms and conditions of the special contract by it to be performed; but that appellees have wholly failed to comply with the terms thereof in this: That they have failed to present their claims for loss or damage in writing, verified by their affidavit, within the time given and stipulated by the contract. To each of such affirmative paragraphs of answer appellees replied by general denial and by a plea of want of consideration. Upon the issues thus formed, the cause was tried by a jury and a verdict was returned in favor of appellees for \$525. With its general verdict, the

jury returned answers to interrogatories. Judgment was rendered on the verdict and appellant's motions for a new trial and in arrest of judgment were respectively overruled. The errors assigned and relied on for reversal are: (1) Error of the court in overruling the motion for a new trial; (2) the overruling of appellant's motion in arrest of judgment; (3) the complaint does not state facts sufficient to constitute a cause of action.

Since the amendment of §348 Burns 1908,

1. §343 R. S. 1881, by Acts 1911 p. 415, §348

Burns 1914, no question is presented by the third error assigned.

The question arising under the motion for a new trial, and not waived by failure to present in the briefs, is the sufficiency of the evidence to sustain the verdict. *Kaufman v. Alexander* (1913), 180 Ind. 670, 672, 103 N. E. 481; *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 626, 103 N. E. 652; *Harrah v. Dyer* (1913), 180 Ind. 229, 242, 102 N. E. 14, Ann. Cas. 1916B 868.

Appellees do not claim that they complied with the contract pleaded by appellant by filing verified proofs of claims within the five days therein prescribed; but they do contend that they were given no choice of rates, and were compelled to ship at the rate named in the one special contract or not at all; that by reason thereof such alleged contracts are not binding on them; that independent of the state or federal statutes, appellant is liable under the common law for the damages sustained.

Appellant contends that no common-law liability is shown; that the shipments were made under special written contracts, and that in no event can a common-law liability be shown by proof that shipments were so made; that the contracts, under

which the stock was shipped, were valid and were sustained by a sufficient consideration.

The shipments were all interstate commerce and, as to such shipments, state legislation is superseded by the federal statute on the subject.

2. *Wabash, etc., R. Co. v. Priddy* (1912), 179 Ind. 483, 494, 101 N. E. 724; *Adams Express Co. v. Croninger* (1913), 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257 and notes; 4 R. C. L. 909.

Both the shipper and carrier are bound to know that under the federal law regulating interstate shipments there may be at least two rates;

3. that the rates are binding on the parties if they have been filed with the Interstate Commerce Commission and duly approved and published; that the shipper has the option of choosing the rate under which he will ship and, when such option is exercised, the carrier is bound to make the shipment accordingly, and the rights of the parties as to damages sustained by the shipper, if any, will be determined in accordance with any reasonable stipulations accompanying the rate under which the shipment is made; that the shipper can not by contract relieve itself from liability for actionable negligence. *Cleveland, etc., R. Co. v. Hayes* (1913), 181 Ind. 87, 104, 105, 102 N. E. 34, 103 N. E. 839; *Illinois, etc., R. Co. v. Henderson Elevator Co.* (1913), 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290; *Boston, etc., R. Co. v. Hooker* (1914), 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915 B 450, Ann. Cas. 1915D 593; *Adams Express Co. v. Croninger, supra*; *Missouri, etc., R. Co. v. Harriman* (1913), 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; *Hart v. Pennsylvania, etc., R. Co.* (1884), 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717.

To sustain the judgment of the lower court, two

propositions must be established, viz.: (1) That notwithstanding the federal statute on the subject of interstate shipments, there is still a right of action at common law, in certain instances, for damage sustained by the shipper on account of the negligence or wrongful acts of the carrier; (2) that in the case at bar there is evidence tending to sustain the verdict on such theory

Section 22 of the Interstate Commerce Act (24 Stat. at L. 387, §8595 U. S. Comp. St. 1913) provides that: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In considering this provision, the Supreme Court of the United States, in *Texas, etc., R. Co. v. Abilene Cotton Oil Co.* (1907), 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, said: "Repeals by implication are not favored, and indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required. * * * This clause, however, can not in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. * * * The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

The Carmack amendment to the Interstate Commerce Act (34 Stat. at L. 595, §8592 U. S.

Comp. St. 1913), fixing liability on the initial carrier contains the proviso, "That nothing in this section shall deprive any holder of such receipt or bill of any remedy or right of action which he has under existing law."

In the case of *Adams Express Co. v. Croninger*, *supra*, 506, the Supreme Court of the United States said: "The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.' The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability from some default in its common-law duty as a common carrier.

"But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the divers regulation which it was the purpose of congress to put an end to.

"What this court said of the §22 of this act of 1906 in the case of *Texas & Pac. Ry. v. Abilene Cotton Mills*, 204 U. S. 426, is applicable to this contention. It was claimed that that section

continued in force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in §20, that it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act.' Again, it was said, of the same clause, in the same case, that it could 'not in reason be construed as continuing in a shipper a common-law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself.'

"To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself."

From the foregoing we conclude that a common-law action for damages may be sustained by the shipper against the carrier in certain instances for damages sustained in an interstate shipment of property. In an interstate shipment of freight

where the shipper is compelled to ship under

4. a special contract restricting the liability of the carrier, or not at all, and is denied the privilege of paying the higher authorized rate and shipping under such unrestricted common-law liability, as is authorized by the federal statute, it can not be said that such contract is freely and fairly entered into or that it affords the carrier

any protection from its common-law liability, since it is invalid. In such instance, the carrier has by its own wrongful act prevented the

5. making of a lawful contract mutually binding upon the parties thereto as contemplated by the federal statute and has, as affecting the rights of the shipper, taken the case outside the provisions of the statute, and can not rightfully be heard to deny him his common-law remedy for damages sustained by reason of its failure to safely transport and deliver the freight at the place of destination. *Cleveland, etc., R. Co. v. Hayes, supra; Cleveland, etc., R. Co. v. Hollowell* (1909), 172 Ind. 466, 470, 88 N. E. 680; *Pittsburgh, etc., R. Co. v. Mitchell* (1910), 175 Ind. 196, 208, 91 N. E. 735, 93 N. E. 996; *Keithley v. Lusk* (1915), 190 Mo. App. 458, 177 S. W. 756, 759; *Adams Express Co. v. Croninger, supra; Boston, etc., R. Co. v. Hooker, supra; Chicago, etc., R. Co. v. Core* (1915), (Tex. Civ. App.), 176 S. W. 778, 782; *Wall v. Northern Pac. R. Co.* (1914), 50 Mont. 122, 145 Pac. 291, 292; *Wise v. Atlantic, etc., R. Co.* (1915), 101 S. C. 510, 86 S. E. 22.

Where a carrier relies on a special contract limiting its liability, or showing nonliability, the burden is on it to show a valid contract and to establish the reasonableness of the pro-

6. visions upon which it relies. If there is no valid contract, such defense is not available. 4 R. C. L. 920, §377; *Wall v. Northern Pac. R. Co., supra; Wabash R. Co. v. Thomas* (1906), 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.), 1041; *Houtz v. Union Pac. R. Co.* (1908), 33 Utah 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628; *Rosenfeld v. Peoria, etc., R. Co.* (1885), 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; *St. Louis, etc., R. Co. v. Alex-*

ander (1913), 227 U. S. 218, Ann. Cas. 1915B 77, and notes pp. 80-86.

In the case at bar, there is evidence tending to show that appellees had to sign the special contracts relied on by appellant to secure the shipment of their live stock; that appellant would not move the cars until such contracts were signed; that one of the appellees had asked appellant's agents if they would ship the stock without such contract and was informed that it would not be done; that the agents made him sign up blank contracts in advance of the shipments.

The verdict of the jury finds every material, issuable fact in favor of appellees. The evidence is by no means conclusive upon the propositions that appellees were given no choice of rates and were compelled to ship under the special contract relied on by appellee or not at all. But there is evidence from which such facts may have been

7. inferred by the jury. Where the necessary inferences to support the verdict have been drawn from the evidence, this court will not disturb the verdict on the insufficiency of the evidence, if there is any evidence from which such inferences may have reasonably been drawn, though other and different inferences of facts might reasonably have been drawn therefrom.

In *Cleveland, etc., R. Co. v. Hollowell*, *supra*, the Supreme Court said: "It is not necessary, to conclude the owner by the terms of a special contract limiting the liability of the carrier, that he should actually have been offered the option of shipping subject to the terms of such contract or under the carrier's common-law liability. It will be sufficient if it would have been given if the owner had demanded

it. But if such demand would have been unavailing, the owner would be under no duty to make it, and his assent to a contract restricting the common-law liability of the carrier would not bind him." See, also, *Cleveland, etc., R. Co. v. Hayes, supra*, 105.

We find no reversible error. Judgment affirmed.

Ibach, C. J., Caldwell, Moran, Shea and Hottel, JJ., concur.

NOTE.—Reported in 110 N. E. 756. Limitation of carrier's liability for injury to or loss of goods as affected by the Interstate Commerce Act, Ann. Cas. 1912B 672; 1915D 612. Constitutionality of state regulation of interstate commerce, 27 Am. St. 547. See, also, under (2) 7 Cyc 421; (4), (5) 6 Cyc 395, 396; (6) 6 Cyc 519; 9 Ann. Cas. 17; 14 Ann. Cas. 416; Ann. Cas. 1914A 231; (7) 6 Cyc 505.

ALSMEIER ET AL. v. ADAMS ET AL.

[No. 8,661. Filed July 1, 1914. Rehearing denied June 3, 1915. Transfer denied June 2, 1916.)

1. MUNICIPAL CORPORATIONS.—*Public Improvements.—Acceptance.—Effect.*—The acceptance of a public improvement and approval of the assessments by a board of public works is a *quasi* judicial act, and is conclusive against property owners unless fraudulent. pp. 232, 250.
2. PLEADING.—*Complaint.—Collateral Attack.—What Constitutes.*—Where the plaintiffs in an action sought to annul the acceptance of a public work by the board of public works and to have the assessment roll therefor declared void, and prayed an injunction restraining the collection of assessments on account of such public work, the attack on such acceptance and assessment roll is direct and not collateral, as the injunctive relief asked for is only incidental or additional to the principal purpose of the action. p. 232.
3. MUNICIPAL CORPORATIONS.—*Public Improvements.—Assessments.—Actions to Declare Invalid.—Sufficiency of Complaint.*—Where, in an action to have the acceptance of a public sewer annulled and to have the assessment roll declared void, the complaint, while not charging fraud in specific terms, averred a radical and inexcusable departure from the kind of sewer specified in the contract; that the construction work was defective; and that there was a substantial saving to the contractor by means of such departure and an arbitrary acceptance of the work with full knowledge of all the facts and for the express purpose of relieving the contractor, such facts

are sufficient to charge constructive fraud and the complaint states a good cause of action, as fraud or fraudulent intent need be averred as a fact only in actions to which the statute of frauds, §7483 Burns 1914, §4924 R. S. 1881, is applicable. p. 233.

4. MUNICIPAL CORPORATIONS.—*Public Improvements.—Acceptance of Work.—Effect.*—Where the board of public works is authorized by statute to determine whether a public work has been completed according to contract, an acceptance of such work, in the absence of fraud, is conclusive on all persons affected that the work has been so completed. p. 237.
5. MUNICIPAL CORPORATIONS.—*Public Improvements.—Acceptance.*—While the law requires only a substantial compliance with the terms of a contract, a board of public works is without authority to bind the property owners by the acceptance of a public work which departs radically from the contract specifications. p. 238.
6. MUNICIPAL CORPORATIONS.—*Public Improvements.—Compliance with Contract.—What Constitutes.—Acceptance.—Constructive Fraud.*—Whether there has been a substantial compliance with the terms of a contract for a public work or a radical departure therefrom depends upon the exigencies of the occasion and the surrounding circumstances. Where a completed public work departs from the contract specifications, in determining whether the departure has been so radical as to make the acceptance of the work constructively fraudulent, the fact as to the general utility of the improvement for the purposes intended and whether affected property owners have suffered pecuniary injury are important considerations. p. 238.
7. MUNICIPAL CORPORATIONS.—*Public Improvements.—Authority of Board of Public Works.*—In the building of a sewer, where unforeseen difficulties arise rendering the completion of the work according to the contract specifications impracticable, the board of public works is authorized to permit a completion of the work in a manner substantially the same as called for by the contract, and the board, in consenting under such circumstances, to a substitution of reinforced concrete pipe sewer for one of monolithic concrete construction, where the former was of the same diameter and general utility as the latter, acted within its authority. p. 239.
8. MUNICIPAL CORPORATIONS.—*Public Improvements.—Changes in Work.—Consent of Board of Public Works.*—A contract for the construction of a sewer providing that if, because of unforeseen circumstances, it should become necessary to substantially change the specified process of construction the written order of the board of public works must first be obtained; and, because of an unforeseen contingency, a change was made in the method of construction without such written order from the board but with the consent of the city engineer the failure to obtain the written order, while an irregularity, did not invalidate the proceedings. p. 245.
9. MUNICIPAL CORPORATIONS.—*Public Works.—Power of Board of Public Works.*—Where the board of public works of a city was

- vested with the power to consent to such changes in the specified method of construction of a sewer as was rendered necessary by reason of unforeseen contingencies, it had the power to ratify a change made by the contractor, although its written consent to the change was not first obtained as required by the contract, and an acceptance of such work with knowledge was a ratification. p. 245.
10. FRAUD.—*Actions.—Right of Action.*—The mere fact of fraudulent or wrongful conduct in a completed act gives no right of action unless such conduct results in injury to the complaining party. p. 252.
11. FRAUD.—*Constructive Fraud.—What Constitutes.*—Where the conduct of a party results in grave injury, his acts, however innocent, may be constructively fraudulent. p. 252.
12. MUNICIPAL CORPORATIONS.—*Public Improvements.—Fraud.*—An inference of fraud can not be deduced from the mere fact that a completed public work does not comply strictly with the specifications, as a substantial compliance is all that the law requires. p. 252.
13. MUNICIPAL CORPORATIONS.—*Public Improvements.—Acceptance.—Board of Public Works.—Powers.*—A contractor engaged in a public work satisfies the law by a substantial compliance with the contract, and, in determining whether there has been such a substantial compliance as to repel the inference of fraud, the board of public works has the right to exercise a certain discretion in accepting the completed work, which acceptance is binding upon the property owners unless the work as accepted differs entirely from the contract specifications or is utterly worthless. p. 252.
14. MUNICIPAL CORPORATIONS.—*Public Improvements.—Defects.—Acceptance.*—A contract for the construction of a sewer provided that it be of monolithic concrete, at least eight inches thick, and stipulated the amount of infiltration permissible. When a part of the sewer had been completed it was found impracticable, because of unforeseen obstacles, to complete the work according to the contract specifications, and the remainder of the sewer was constructed of reinforced concrete pipes of the proper diameter, but which were made of poor material and were so imperfectly joined together that approximately five times as much surface water seeped into the sewer as was permitted by the specifications; also, some of the pipes used were cracked and broken. *Held*, that the completed sewer did not substantially comply with the terms of the contract and that its acceptance by the board of public works should be set aside as constructively fraudulent. p. 253.
15. APPEAL.—*Jurisdiction over Parties.—Cross-Errors.—Appearance.*—In a suit commenced by a number of property owners to enjoin the collection of assessments on account of the construction of a sewer, a judgment was rendered in favor of part of the plaintiffs and against some of them on the ground that by their acts they were estopped from complaining against the collection of such assessments. The latter appealed and the other plaintiffs filed a confession of error. The contractor, one of the appellees, as-

signed cross-errors challenging the correctness of the conclusions of law of the trial court upon which is based the judgment in favor of the appellee plaintiffs, but no notice of such assignment was served on appellees. The reply brief of appellants attacked not only such cross-assignment of errors as affected them, but also argued against those cross-errors attacking the conclusions of law which affected the appellee plaintiffs alone. The appellate court reversed the judgment and remanded the case, with direction as to costs which affected appellees, and thereupon they filed a petition for rehearing setting up that the appellate court had no jurisdiction over them in reference to the cross-errors. *Held*, that as the argument of the reply brief to cross-appellants' assignments of cross-errors was both for the purpose of sustaining the conclusions of law favorable to appellee plaintiffs as well as to attack such conclusions of law as were adverse to appellants, such brief constituted an appearance for appellee plaintiffs and gave the appellate tribunal jurisdiction to enter the mandate it did. p. 259.

16. ATTORNEY AND CLIENT.—*Authority of Attorney.—Presumption.*—A member of the firm of attorneys which represented all party plaintiffs below, and who filed the confession of error on behalf of appellee plaintiffs, made an affidavit in support of the petition for rehearing and the motion to modify the appellate court's mandate, in which affidavit he set up that his firm took no part in the prosecution of the appeal after the filing of such confession of errors, but did not state that the attorneys who filed the reply brief in behalf of appellees did not have authority to do so. *Held*, that in the absence of such a showing the attorneys will be presumed to have had the requisite authority to file the brief for appellees. p. 261.

From the Marion Superior Court (79366); *Edward W. Little*, Judge *pro tem*.

Action by Fielding A. Conway and others against the Indianapolis Board of Public Works and others, to set aside an assessment roll and to enjoin the collection of assessments on account of the construction of a sewer. Judgment was rendered in favor of Margaret E. Adams and others, and against Lizzetta Alsmeier and others, and Lizzetta Alsmeier and others appeal. *Reversed*.

Louis B. Ewbank, John W. Hanan and J. Frank Hanan, for appellants.

Leo M. Rappaport, Albrecht R. C. Kipp, Smith, Hornbrook & Smith and Richard L. Ewbank, for appellees.

CALDWELL, J.—Fielding A. Conway and others filed their complaint in the court below in behalf of themselves and a large number of other land and lot owners, who with said Conway and others are designated in this opinion as plaintiffs, asking as relief that the acceptance of the Pleasant Run interceptor sewer by the board of public works of the city of Indianapolis, and the primary assessment roll adopted thereon be set aside as fraudulent and void, and that certain defendants be enjoined from collecting any assessments on account of the construction of said sewer, and from taking any further steps in the matter of said improvement.

Stated generally, the basis of grievance, as set out in the complaint, is to the effect that, while the specifications required that a large portion of said sewer be constructed of monolithic concrete eight inches in thickness, most of such portion, as actually constructed, consists of reinforced concrete pipes in sections of three feet in length and about three and one-half inches thick; and that said sewer was defectively constructed, and that material of poor grade was used.

The board of public works of said city, the treasurer of Marion county, as *ex officio* treasurer of said city, the city comptroller and Morris M. Defrees, as contractor, were made defendants. Said Defrees having assigned his interest in said assessment roll to August M. Kuhn, and having thereafter died, his administrator, Hugh J. Defrees, and said assignee are made appellees in this court.

Morris M. Defrees' demurrer to the complaint for insufficiency of facts was overruled, and exception reserved. Each defendant filed a general denial. Said defendant contractor filed also a special answer in three paragraphs, Nos. 2, 3 and

4. The theory of the second paragraph of answer is that said change in the method of construction was made by authority and direction of the city officers, on account of an alleged impossibility to use the continuous monolithic form of construction, because of large quantities of water in the trenches; the third, that the lot owners were estopped by reason of an alleged acquiescence in the change of method of construction, they having knowledge of the facts; and the fourth, that the work had been inspected and accepted by the city, and made a part of the city's sanitary sewer system, and could not be changed. On a trial by the court, judgment was rendered in favor of appellee Margaret E. Adams and 170 other appellees, who were plaintiffs below, perpetually enjoining defendants from in any manner attempting to enforce assessments against the respective properties of said appellees based on said work. Judgment was rendered against appellant Lizzetta Alsmeier and sixty other appellants, who were plaintiffs below.

The court, at the request of the parties, found the facts specially, and stated conclusions of law thereon. Except as stated in other connections, the material part of the finding of facts is in substance as follows: On June 22, 1906, the board of public works of the city of Indianapolis adopted a resolution under the provisions of the act of 1905 for the construction of the Pleasant Run interceptor sewer, to begin on the east bank of White river at a designated point, and thence in a northeasterly direction, approximately a distance of 20,665 feet to the center of Keystone avenue.

The specifications provided that said sewer from White river to a point within 3,580 feet of its Keystone avenue terminus should be constructed circular in form, and should consist of either monolithic construction eight inches in thickness or of brick laid in two courses, and that the remaining part of said sewer should consist of vitrified tile sectional pipes, double strength, twenty-four inches in diameter. The engineer's estimate of the cost of said sewer was \$130,000. On May 13, 1907, said board of public works, pursuant to notice duly given and bids received, entered into a contract in writing with said Morris M. Defrees for the construction of said sewer, according to the plans, specifications, etc., at the price of \$5.835 per lineal foot. The profile showed the presence of water along the line of a part of said sewer at a depth of from six to eight feet, but did not show the quantity or velocity of movement of such water. Said sewer throughout practically its entire length was constructed at a depth of from five to ten feet below said water level. Through a large part of its course, said sewer followed the north bank of Pleasant Run, and within an average distance of 100 feet from that stream. The earth formation along the line of said sewer and adjacent to said stream consists of clay near the surface and of gravel and sand at greater depth, which sand and gravel was found to be impregnated with a large quantity of water flowing towards said stream. The quantity and velocity of such water could not be and was not definitely ascertained by said contractor or the city engineer, until in the process of actual construction. Defrees commenced said work at the White river terminus in June, 1907, and after constructing a few hundred feet of it,

sublet the contract to John J. Jenkins. Defrees and Jenkins continued said work until 4,210 feet of monolithic concrete construction eight inches thick had been completed. Said sewer was constructed in a trench, averaging in depth about nineteen feet, sheeted with wooden sheeting. In monolithic construction, the lower half of the sewer is called the invert and the upper half the arch. The process of monolithic construction, which process was followed in this case, is as follows: The bottom of the trench is excavated concave in form, and the concrete mixture is poured into the bottom the requisite thickness, whereupon a metal mold is placed upon such concrete in such a manner as to permit the formation of the entire invert. The concrete is then packed around such mold the required thickness. After the invert has become thoroughly dry and hard, the mold is inverted and placed to form the inner surface of the arch, and concrete packed around and allowed to harden as aforesaid. The monolithic work here was constructed in sections varying from ten to fifty feet in length. When said 4,210 feet of sewer had been constructed, Defrees and Jenkins met with difficulty in the amount of water encountered in the trench, which water seeped through the sheeting and into the trench in such quantities as to wash the cement out of the concrete and thereby reduced it to a condition in which it would not harden, whereby the strength of such concrete was materially lessened. Defrees and Jenkins employed various methods to carry off the water and prevent it from coming in contact with said concrete, but were unable by the means used to prevent such water from coming in contact with the arch, which continued to crumble and cave in, whereupon said contractors obtained the consent

of the engineer to substitute said reinforced concrete for the monolithic construction. Having obtained such consent, Defrees and Jenkins contracted for the manufacture of such reinforced concrete pipe to be used in completing the concrete portion of said work, the same to be manufactured along the line of the sewer at \$1.50 per running foot for pipes thirty inches in diameter, and \$1.15 per running foot for pipes having a diameter of twenty-seven inches, being the diameters required by the specifications, of which contract and the terms thereof the engineer and his assistant had full knowledge. Said contract provided that such pipes should be composed of a mixture of three parts sand and gravel and one part of cement, manufactured in molds above the ground, each pipe to be three feet long, with walls three and one-half inches thick, reinforced by steel bands running longitudinally and in circular form through such concrete, one end to be a flange or bell. Except as otherwise indicated in this opinion, the pipes were manufactured as specified in the contract. The process of construction by using such pipes, which process was followed here, is as follows: Two pipes are placed in the trench, so that the uniform end of one is inserted into the bell end of the other, and the two are bound and fastened together with hooks and bands of steel. A close-fitting steel band is then placed around the joint on the inside, and a like band with a slot in the top around the outside, and cement of a consistency to run freely is poured into the slot until the joint is filled. When the cement in the joint has become thoroughly dry and hard, the inner and outer bands are removed. On September 24, 1909, the engineer filed with said board his report to the effect that the contract for said improvement had been com-

pleted, which report showed the length of said sewer to be 20,612 feet, and that the contract price at \$5.835 per lineal foot amounted to \$120,271.02, and that, making certain additions for extra work and deductions for material not furnished, the net contract price was \$119,370.77, being the amount of the assessment roll. Thereafter, on said day, the board adopted the primary assessment roll on said improvement, by which roll all the properties within the ascertained district were assessed, including real estate of each party plaintiff to this action, and for whom this action was brought. Thereafter, pursuant to notice, and after several continuances, the board on November 3, 1909, heard the complaints of such property owners as appeared for that purpose. A large number of the property owners attended, some of whom remonstrated against the acceptance of said sewer, and others of whom urged its acceptance. The board thereupon approved the assessment roll without change, and caused the same to be entered on the proper books of the treasurer of said city, and such assessments as therein entered, and as have not been paid constitute liens on the respective properties of the parties plaintiff to this action, and for whom this action is brought, which properties are specifically described, and which respective amounts of said liens are specifically found by the court. The board in adopting said primary assessment roll, and in approving the same as a final assessment roll made no independent investigation as to whether said contract was completed or as to what benefits were received, but it acted upon the judgment and report of the assessment bureau of said city and of the engineer. The court found that the cost of construction of the sewer from end to end was approximately \$120,000. In the latter

part of December, 1908, after a large part of the reinforced concrete construction had been completed, said Conway and others, acting in their own behalf, and as representing property owners whose property was liable for assessment for the construction of the sewer, first learned that the contract required monolithic construction, and thereupon they protested to the board as to the character of the material being used in said reinforced concrete pipes. On February 15, 1909, 256 property owners, including plaintiffs, having learned that the contract provided for monolithic construction and that reinforced concrete was being substituted, filed with the board a remonstrance based on the assigned reason generally stated that said sewer was not being constructed according to specifications, and that as being built it would be worthless. On May 15, 1909, 286 property owners, including plaintiffs, filed with the board a remonstrance similar to the previous one, and delivered a copy thereof to the engineer, contractor and subcontractor, stating also therein that in view of the method of construction being used they would protest against the acceptance of the sewer.

This suit was instituted October 2, 1909, by and in behalf of plaintiffs, all of whom the court finds had learned by rumor or otherwise, at or prior to the time of signing said remonstrances, that the sewer was not being constructed according to contract. The court then sets out the names of said persons, the description of their said real estate and respective amounts of their assessments, and the length of time prior to the signing of the remonstrance that they knew by rumor or otherwise that said sewer was being constructed of reinforced concrete pipes rather than of monolithic concrete.

On said finding of facts, the court stated ten conclusions of law, the first, ninth and tenth of which are in substance as follows: (1) That the action of said board in adopting said primary assessment roll, and all subsequent acts thereon were null and void as to all persons who made seasonable objection to the construction of such sewer, under such change of plan, for the reason that the sewer constructed was so radically different from that specified that said board had no power to accept it. (9) In the ninth conclusion the court sets out the names of said 171 persons and states that they are entitled to a perpetual injunction against the collection of the assessments returned by the primary and permanent rolls. (10) In the tenth conclusion the court states that the 61 appellants are estopped from contesting the validity of the assessment rolls, for the reason that they had either connected their properties with said sewer or had neglected seasonably to protest, with knowledge of the facts. As the other conclusions must stand or fall with the first, ninth and tenth, it is not necessary to set them out.

The decree follows the conclusions of law. Each appellant excepted to conclusion No. 10, and has properly assigned error on the same. Said 171 property owners, in whose favor judgment was rendered, and also said board of public works and the officers of said city, who were defendants below, have appeared to this appeal, and as appellees have filed a confession of error, to the effect that the court erred in the conclusion No. 10 stated on the findings. Said Hugh J. Defrees as such administrator, and said August M. Kuhn, as such assignee, have each assigned cross-errors, challenging the court's ruling on the demurrer to the complaint, and challenging also the first,

second, seventh and ninth conclusions of law respectively.

We first determine the sufficiency of the complaint, which question we hold to be properly presented. Its allegations are in part to the effect that the contractor, after having completed about 4,000 feet of the sewer according to the specifications, used, in constructing the balance of the concrete portion of it, reinforced concrete pipes three and one-half inches thick, instead of following the prescribed plan of continuous monolithic concrete work eight inches thick; that no person in authority consented to such change, and that the engineer in charge, on being solicited by the contractor, refused to consent to such change; that the contractor departed from the specified plan of work, as alleged, over the protest of the property owners, who were plaintiffs below; that the sand and gravel used in building said pipes contained soil and other foreign substances; and that, in constructing such sewer, the contractor used cracked and broken pipes, and did not properly cement the joints, and that as a consequence, large quantities of water passed into the sewer from the surrounding earth, and that the noxious substances designed to be carried by the sewer would escape therefrom if it should be used. Facts are alleged to the effect that the city engineer repeatedly assured plaintiffs that the sewer would not be recommended for acceptance, and that plaintiffs, as property owners affected, relied on such assurance, and as a consequence were deceived into a failure to be present and protest when such sewer was recommended for acceptance and actually accepted by the board; that the sewer as constructed by the use of such pipe, cost \$10,000 less than would have been its cost if constructed accord-

ing to the specifications, and that the board with full knowledge of the facts alleged, arbitrarily accepted said sewer as a substitute for the one specified, in order to save the contractor and his sureties and assigns from loss. The prayer was that the acceptance of said sewer and the primary assessment roll adopted thereon be set aside as fraudulent and void and of no force or effect, and that defendants be enjoined from taking any steps looking to the collection of assessments based on such acceptance and on said assessment roll.

The argument advanced against the sufficiency of the complaint may be stated in outline as follows: That the board of public works was clothed with authority to determine whether such work had been completed according to the contract; that in so determining it acted in a *quasi* judicial capacity; that the acceptance and assessments resulting from such determination partake of the nature of judgments, and like judgments they are not open to collateral attack; that on the contrary, they are binding on the property owners, unless adjudged fraudulent in a direct proceeding, expressly directed to such end, and that this proceeding is collateral and no fraud is charged. The argument is sound to the extent that the acceptance of the

work and approval of the assessments was a

1. *quasi* judicial act, conclusive against the property owners unless fraudulent. *Town, etc. v. Gorman* (1912), 179 Ind. 1, 100 N. E. 296; *Gorman v. Johnson* (1910), 46 Ind. App. 672, 91 N. E. 971; *Shank v. Smith* (1901), 157 Ind. 401, 412, 61 N. E. 932, 55 L. R. A. 564; *Darnell v. Keller* (1897), 18 Ind. App. 103, 45 N. E. 676. As determined from the averments and prayer of the complaint,
2. however, the proceeding is directed specifically to the end that said acceptance may be

annulled, and said assessment roll declared void. The attack is therefore direct rather than collateral. The mere fact that injunctive relief is asked as an incident or in addition to the principal relief sought does not change the nature of the attack. Should the other relief prayed for be granted, the equivalent of such injunctive relief would follow as a necessary consequence. A proceeding to collect the assessments could not be successfully maintained, if prior to the bringing of such an action, the acceptance of the work and the assessment roll adopted thereon had been set aside. *State v. Hindman* (1902), 159 Ind. 586, 65 N. E. 911; *Cotterell v. Koon* (1898), 151 Ind. 182, 51 N. E. 235; *Gorman v. Johnson*, *supra*; *Darnell v. Keller*, *supra*; *Kirby v. Kirby* (1895), 142 Ind. 419, 41 N. E. 809; *Asbury v. Frisz* (1897), 148 Ind. 513, 47 N. E. 328; *Frankel v. Garrard* (1902), 160 Ind. 209, 214, 66 N. E. 687.

While fraud in terms is not charged in the complaint, the facts averred show a radical and apparently inexcusable departure from the kind of sewer specified in the contract; materially defective work in the actual construction; a saving of \$10,000 to the contractor, by reason of such departure; and an arbitrary acceptance of the work by the board with full knowledge of all the facts and for the express purpose of relieving the contractor. Such facts, with others pleaded, are sufficient

3. to constitute a charge of constructive fraud or fraud in law. It is only in proceedings to which §21 of our statute of frauds (being §7483 Burns 1914, §4924 R. S. 1881) is applicable that fraud or fraudulent intent must be directly averred as a fact. *Gorman v. Gorman* (1913), 54 Ind. App. 408, 103 N. E. 16; *Crawfordsville, etc., Co. v. Ramsey* (1913), 55 Ind. App. 40, 100 N. E. 1049; *Cotterell v.*

Koon, supra; Gorman v. Johnson, supra; Eiermann v. Milwaukee (1910), 142 Wis. 606, 126 N. W. 53, 27 L. R. A. (N. S.) 1085. The court did not err in overruling the demurrer to the complaint.

We proceed to consider the conclusions of law. Conclusion No. 1 is to the effect that the action of the board of public works in accepting said sewer was void because the sewer constructed was radically different from that specified. Said conclusion, as we construe it, is based on the fact that the plan of construction was changed, as indicated, rather than on the fact that the sewer was defective by reason of unskillful work and the use of faulty material. Briefly summed up, the facts from which the court drew said conclusion, in addition to those hereinbefore set out, are as follows: At the lower end, 4,210 feet of the sewer was constructed according to the specifications, whereupon water difficulties were encountered to the extent that the contractor was able to make progress for a period of more than twenty days at the rate of less than two and one-half feet per day. The contractor was chargeable with knowledge that he would probably have to contend with water, but the quantity and velocity of such water could not be and was not definitely ascertained by either him or the city engineer until a substantial part of said work had been done as aforesaid. Both the contractor and the subcontractor were reasonably experienced in sewer building, and they believed that it was impracticable and impossible to continue said monolithic process of construction, whereupon they called the city engineer and his assistant into conference and, after examining into the situation, it was determined by such conference that it was impracticable to continue such process of construction, under the special circumstances pre-

sented, and that if such process were continued the sewer so constructed would not be serviceable. As applicable to such a situation, the specifications provided that the board reserved the right to make changes more important than those of mere detail "should the exigency arise and become apparent during the progress of the work * * * by reason of obstructions met with which could not reasonably have been foreseen before the work began, notwithstanding such changes or alterations may materially increase or decrease the cost of the work, but the contractor shall not proceed with such change or alterations without a written order from the board, the price agreed upon to be added to or deducted from the contract price being stated in the order." The contractor, however, instead of appealing to said provision of the specifications, continued said work a distance of 150 feet by the use of said reinforced concrete pipe in place of said monolithic construction, and then submitted said work to the engineer, who examined and approved the same, and gave his verbal consent to the completion of the concrete portion of said sewer by the use of such pipe, whereupon the contractor proceeded with such process. The board first learned of such change in the method of construction when about 1,000 feet of such pipe had been manufactured and laid, but at no time either formally consented or objected to such change. At some time while such work was going on, the contractor was informed by said board or some member of it that the board had not consented to such change, and that he was proceeding at his own risk. After the board had knowledge of such change in the method of construction, it frequently discussed the matter with the engineer and mayor, and constantly acquiesced therein. Thirteen thousand feet of said

sewer was built by the use of reinforced concrete pipe, 12,000 feet of which was constructed after said board had knowledge of said change in process of construction, and while it was acquiescing therein. The remaining 4,000 feet of the sewer was completed by the use of sewer tile as specified. The engineer having reported the sewer as completed, the board, with full knowledge of the use of said reinforced concrete pipe instead of said monolithic construction, and of the conditions that caused such change to be made, accepted the sewer as in full performance of the contract.

The real difficulty encountered in said process of monolithic construction seems to have been to prevent the water from coming in contact with the arch. On this point the court found from the evidence that it was not possible to overcome such difficulty by the use of any of the various means adopted, but that by recourse to methods not specified by the finding, it would have been practicable to have prevented the water from coming in contact with such arch, but that to have done so would have resulted in a large expense over and above the expense incurred in the process subsequently followed, and would have rendered the cost of construction in excess of the cost under such process. The contract price of said sewer as found by the court was \$119,370.77, and the actual cost of construction was practically \$120,000, or, assuming said sewer to be paid for at the contract price, it was constructed at a loss to the contractor of about \$629.23. The court finds also that such reinforced concrete sewer, if built in a skillful and workmanlike manner, is as impervious to water and as strong as such monolithic construction. It is necessary that the power be lodged somewhere to determine whether a public work such as is

involved here has been completed according to the contract. Our statute clothes the board of public works with such authority, and when that

4. body has determined such question, and indicated its conclusion by an acceptance of the work, and an approval of the assessments therefor, such acceptance, in the absence of fraud, is conclusive on all persons affected that the work has been completed as required by the contract. *Town, etc. v. Gorman, supra; Dawson v. Hipkind* (1909), 173 Ind. 216, 89 N. E. 863; *Holloran v. Morman* (1901), 27 Ind. App. 309, 59 N. E. 869; *Darnell v. Keller, supra.*

Actual fraud is not found here as a fact. Unless a conclusion of fraud in law or constructive fraud springs from the mere fact of said change in the process or manner of construction, under the circumstances found to exist, which question we shall consider later, the finding does not give rise to an inference of fraud in so far as it concerns the phase of the case now under consideration. The contractors believed that it was impossible to complete said sewer by said monolithic process. The engineer apparently in good faith concurred in such belief, and in the opinion that the sewer would not be serviceable if so constructed, and in a like spirit the engineer consented to the change, and approved the process subsequently adopted and followed. There is nothing in the findings to indicate that the board, as the work progressed and in the final acceptance, did not honestly believe that said change in process was necessary to a completion of the work, or that such board was guilty of any actual fraud in such acceptance, or that such acceptance was induced by the wrongful conduct of others. This we say aside from any force and effect that must be given to the mere fact of such change

in process. While a strict or literal compliance with the terms of the contract is not required, and a substantial compliance satisfies the law, yet the binding effect given to the act of the board in accepting an improvement as complete, does not extend to cover a case in which such board, after contracting for one thing, has accepted something different in its place. The board has no

5. power or authority to bind the property owners by an appeal to the principle of substantial compliance when the work in fact departs radically from the contract and specifications. *Cooley, Taxation* (2d ed.) 672; *Bond v. Mayor* (1869), 19 N. J. Eq. 376; *Church v. People* (1898), 174 Ill. 366, 51 N. E. 746; *Cahn v. Metz* (1906), 115 App. Div. 516, 101 N. Y. Supp. 392.

It would seem that the terms "substantial compliance" and "radical departure" must be taken to be relative rather than absolute in mean-

6. ing, and that the force of such terms in their practical application should be shaded somewhat by the exigencies of the occasion or the emergency arising from the surrounding and attending circumstances. *Trimble v. Stewart* (1912), 168 Mo. App. 276, 153 S. W. 1086. Moreover, where, as here, it is apparent that the work as constructed departs from the work as specified by the contract, and there must be a determination of the question of whether such departure is so radical and unwarranted as to render the act of accepting it constructively fraudulent and therefore voidable, the fact of whether the improvement as made is such as reasonably to answer the intended purposes, and of whether the departure will affect the usefulness of the improvement, and of whether the objecting property owners have suffered some pecuniary injury therefrom, can not be ignored.

Holloran v. Morman, supra; Elliott, Roads and Streets §382; *Gage v. People* (1901), 56 L. R. A. (Ed. note, p. 923); Page & Jones, Taxation by Assessments §527.

Under the finding, the three necessary elements of such a sewer as is contemplated here are capacity, imperviousness to water infiltration and strength. The sewer as constructed has the same capacity as that specified, and the court expressly finds that a sewer built of such reinforced concrete pipes in a skillful and workmanlike manner would be as impervious to water and as strong as a sewer constructed in accordance with said monolithic process and as specified.

It is argued, however, that the process adopted differs so materially from that specified that, conceding that in the course of the work

7. and after a substantial part of the sewer had been built, water difficulties were encountered of such a nature as to render it practically impossible to continue such process, the board was without power to authorize or ratify such a change as was made here. It is argued that the board was without authority under the circumstances presented to do otherwise than to require the work to continue as specified, although it should be reasonably apparent that the resulting sewer would be worthless, or, if the work should be discontinued as impossible of performance, to adopt new specifications, readvertise and relet the contract. If, under the force of overwhelming circumstances, the contractor should abandon the work when incomplete, the municipality would not be authorized to pay him for the work done, or to require the property owners to do so, as the statute makes no provision for the acceptance of an incomplete improvement or for payment *pro tanto*. *Darnell v.*

Keller, supra; Gage v. People, supra (Ed. note p. 923).

The argument carried out leads to the conclusion that if any substantial part of such an improvement should prove to be impossible of performance by reason of unforeseen obstacles encountered in the progress of the work, the board would have no authority to arrange with the contractor for the completion of the contract by the use of some process other than that specified, even though the results from the substitution would be eminently satisfactory. Thus, applying the argument, should the water difficulties be such as to interfere with the construction of but 100 feet or ten feet of the sewer by such monolithic process, the board would not be warranted in authorizing such 100 feet or ten feet to be built by some other process just as good, but would be required to stop the work and adopt new specifications, etc., for such portion of the sewer. It can not be said that the board has authority of a certain nature and scope when the affected part of the sewer is of a certain length and an absence of authority, or authority of a different nature or scope when the affected part is of a different length. Hence, carrying the argument to its legitimate conclusion, although the unforeseen difficulties should interfere with the specified construction of but a comparatively inconsiderable portion of the sewer, the board would be required to readvertise, etc., rather than authorize the completion of the work by some other satisfactory process. The argument advanced does not appeal to us as sound.

It is evident that the property owners here were in need of a sanitary sewer and desired that it be constructed. Viewed in the light as it then existed, a monolithic sewer commenced could not be

completed. It is not an unreasonable presumption that had the board been required to adopt new specifications, etc., for the completion of the work, a reinforced concrete sewer would have been specified. On such presumption, assuming the work to have been properly and skillfully done, the people are getting through the direct method of such a change the same structure as would have been built through the roundabout method of reletting, and, as we shall later determine, no one need be wronged. Our conclusion is not unsupported by authority.

In *Meyers v. Wood* (1913), 173 Mo. App. 564, 158 S. W. 909, a public improvement contract provided that the sewer contemplated should be built along the center of Main street. While the work was in progress, the contractor encountered extensive deposits of limestone and high pressure water and gas mains. For the work to proceed further along such street would have necessitated blasting to such an extent as to be very expensive, and there would have been danger of bursting said water and gas mains, for the consequent damage to which the contractor would have been required to pay. In consideration of the situation, the city council authorized the contractor to detour the sewer around through an alley a distance of 1,100 feet. In a direct proceeding, brought by the property owners to cancel the tax bill issued on account of said improvement, arguments were advanced in support of the proceeding, substantially the same as here, to the effect that the acceptance of the sewer was void, because the city council exceeded its power in authorizing the change in the route; that there should have been a new ordinance, a readvertisement, and a reletting; that had

it been known that the sewer was to be built through the alley rather than along the street, perhaps there would have been other bidders, etc., and that as a consequence, the property owners were deprived of the benefit of competitive bidding, etc. In sustaining the action of the city council, the court says: "These contentions all raise but one question and that is concerning the *power* of the city and its officials in making the change to the alley instead of requiring the contract to be carried out and the sewer built along Main street.

"The strongest case to which appellants have directed our attention is that of *City of Maryville ex rel. Bank v. Lippman*, 151 Mo. App. 447, 132 S. W. 47, where the tax bills were adjudged invalid. On reading the opinion, however, it will be noted that the size of the brick was materially changed by the amended ordinance, and the iron dowel pins to connect the curbing were permitted to be left out. The opinion discusses the question, cites authorities, and holds that this change could not be made without a readvertisement. We thoroughly approve the doctrine therein announced. In that case it was properly held that the changes which were allowed were material changes, and they differ from the changing of or deviating from a line of sewer in this that the requiring of dowel pins and the specification of the size of the brick are matters that can be definitely determined at the time the ordinance contracting the work is passed, whereas it is impossible for the contractor or the engineer or the city officials to know exactly what substance will be encountered in digging a ditch for a sewer. One is a matter of definite ascertainment and the other largely a matter of estimate only. One is known to the city officials and all contractors and the other not

definitely known to any of the parties. Certain latitude in judgment must in all public improvement be left to the officials who are intrusted with the power of seeing that it is done. There is no reason to allow them a discretion or the exercise of their judgment where the thing which they change was and could be definitely known at the time of the letting of the contract. There is a reason, as before stated, why they should be allowed to exercise their judgment when they are dealing with a subject which necessarily develops unknown conditions and predicaments as the work progresses. Indeed, it is truly said that changing the size of a brick one-half inch is a material change because such a change may affect the wearing qualities of the pavement and thereby materially lessen the value of the improvement; but here, the sewer as constructed drains exactly the same territory as the sewer provided for in the ordinance prior to the amendment. In either case it is hidden and hence does not detract from the looks of the property. No more and no less sewer connection can be made in the one case than in the other. No fraud or misconduct is shown on the part of any one, so far as this record discloses, in making the change. To our minds, such change was merely a variation of the plans as originally made, which variation was made to overcome the difficulties found to exist on Main street, and such an exercise of judgment would not for one moment be questioned were it made between private persons. The sewer as constructed served every purpose and use intended under the ordinance and contract as originally made. This court in the case of *Stover v. City of Springfield*, 167 Mo. App. 328, 152 S. W. 122, held that such a change would not invalidate tax bills, and to the same effect is the

decision of the St. Louis Court of Appeals in the case of *Gratz v. City of Kirkwood and Robert Wycoff*, 165 Mo. App. 196, 145 S. W. 870. * * *

"After all, it must be borne in mind that contractors and city authorities are only human; and they should be held to no higher duty in the use of good sense or good judgment than the ordinary run of men. The opinions holding that a strict compliance with the law is necessary in order to bind the tax-payer on a special tax bill, as we read them, mean a substantial, sensible, businesslike compliance—a practical rather than a theoretical compliance—and courts should view these relations as practical men rather than as theorists."

In *Stover v. City*, *supra*, the sewer was shortened, laterals added and the grade changed. See, also, *Hastings v. Columbus* (1885), 42 Ohio St. 585, where, in a street improvement proceeding, the street was widened and a drain added; and *Board v. Gibson* (1901), 158 Ind. 471, 63 N. E. 982, where, in performing a contract to build a courthouse, the contractor having excavated to the specified depth, came to quicksand rather than solid ground, whereupon the board, without additional specifications or advertising for bids, arranged with the contractor to excavate deeper and to build a subbasement; and *Smith v. Board* (1893), 6 Ind. App. 153, 33 N. E. 243, where in executing a contract for the building of bridge piers unforeseen difficulties were encountered. See also *Edwards v. Cooper* (1906), 168 Ind. 54, 64, 79 N. E. 1047; *Bass Foundry, etc., Works v. Board* (1888), 115 Ind. 234, 242, 17 N. E. 593; *Board v. Cincinnati, etc., Co.* (1891), 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502; *Board v. Newlin* (1892), 132 Ind. 27, 31 N. E. 465; *Sims v. Hines* (1890), 121 Ind. 534, 542, 23 N. E. 515; *Board v. Silvers* (1864), 22 Ind.

491, 502; *Hellenkemp v. City* (1868), 30 Ind. 192; *Holloran v. Morman, supra*; *Lake Erie, etc., R. Co. v. Walters* (1895), 13 Ind. App. 275, 41 N. E. 465; *Criswell v. Board, etc.* (1904), 34 Wash. 420, 75 Pac. 984; *Dugger v. Hicks* (1894), 11 Ind. App. 374, 36 N. E. 1085.

As indicated, the specifications provided that in case the exigency should arise calling for any substantial change in the method or process of

8. construction, by reason of unforeseen obstacles, etc., such changes should be made only on the written order of the board. This provision was not followed. The fact of the omission of such written order, however, is not sufficient to invalidate the proceedings. Granting that the power existed to direct or permit the use of such reinforced concrete construction under the circumstances presented, a provision in the specifications that the exercise of such power should be evidenced by writing was not necessary to its validity. If the power to direct or permit the change existed, it could have been exercised by agreement with the contractor, in the absence of any provision in the specifications to that effect. The fact then that said change was made and carried out without a written order was but an irregularity and not sufficient to invalidate the proceedings. *Pittsburgh, etc., R. Co. v. Hays* (1896), 17 Ind. App. 261, 267, 46 N. E. 597; *Dwyer v. Mayor* (1902), 77 App. Div. 224, 79 N. Y. Supp. 17. But here the use of said reinforced concrete pipes in place of said monolithic construction was made by agreement between the contractor and the engineer. If the

granting of authority so to depart from the
9. literal provisions of the specifications would not have been *ultra vires* as to the board, in case the board rather than the engineer had taken the initi-

ative, then it was within the power of the board to ratify the action of the engineer in said respect. When said matter was first brought to the attention of the board, it did not in terms either approve or disapprove said change in construction, but thereafter it gave said matter frequent consideration, and, as the work progressed, it constantly acquiesced in the action of the contractor and engineer, and in said work as being done, and finally it accepted said improvement with full knowledge that about 13,000 feet of it had been constructed by the use of said reinforced concrete as arranged by the contractor and engineer. Such facts are sufficient to amount to a ratification. *Taber v. Ferguson* (1886), 109 Ind. 227, 233, 9 N. E. 723; *Sears v. Board* (1899), 43 L. R. A. 834; *Page & Jones, Taxation by Assessments* §868; *Hett v. Portsmouth* (1905), 73 N. H. 334, 61 Atl. 596; *Hitchcock v. Galveston* (1877), 96 U. S. 341, 24 L. Ed. 659; *City v. Galpin* (1899), 183 Ill. 399, 55 N. E. 73; *City v. Shepler* (1899), 190 Pa. 374, 42 Atl. 891, 897; 28 Cyc. 1044; *Weston v. Syracuse* (1899), 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. 472.

The engineer and contractor, after having examined actual conditions as they then existed, agreed that it was impracticable to continue said monolithic process of construction, and that, should the sewer be so constructed, it would not be serviceable. The board at first passively acquiesced in the conclusion of the engineer and contractor, and later placed the stamp of approval on it by accepting the sewer. There is nothing to indicate that there was any wider departure from the specifications than was honestly believed to be rendered necessary in order that the unforeseen difficulties and obstacles might be met and overcome. Under such cir-

cumstances, we do not believe that the court's finding, based of necessity on theoretical judgment, that it would have been practicable to have continued such monolithic construction should be controlling.

We proceed, however, to consider the effect of the finding that said sewer is defective by reason of unskillful work and the use of improper material. The finding in its bearing on this question may be summarized as follows: The specifications provided that all materials should be of the best quality of their respective kinds; that the sewer should be so constructed as to prevent the seepage of surface water through its walls and joints; that sand and gravel used in manufacturing the pipes should be free from loam, earth, and other foreign substance. The further finding is in substance as follows: Said sewer was constructed as a part of the general sanitary sewer system of said city, and to that end a number of laterals were to be connected into it; that thereby noxious and other impure substances from vaults, cesspools, and like sources might be carried off from the entire territory drained. As designed, it had sufficient capacity to do said work, and also to carry an amount of surface water reasonably in excess of the normal and usual amount. Sewers built by either such monolithic or by such reinforced concrete process are in theory supposed to be water tight, but in actual experience it is found to be impossible to make them so, and as a consequence, under ordinary conditions an amount of seepage bearing some relation to the extent of the territory drained is permissible, which in said Pleasant Run sewer would amount to a total depth in the sewer of approximately two and one-half inches. In the construction of such a sewer, it is of the highest

degree of importance that it be made at least as nearly water tight as is above indicated, that thereby an undue amount of surface water may not seep or flow into the sewer, and that such noxious substances may be prevented from escaping, which facts, as well as said facts respecting the design and purpose of said sewer were well known to the board, engineer and contractor. The sand and gravel used in manufacturing a substantial number of said pipes contained a considerable amount of earth and loam, which pipes were, as a consequence, inferior in quality and more susceptible to the penetration of water. A substantial number of pipes with broken ends were used, leaving openings in the sewer, ranging from slight to about three inches wide, where said pipes joined together and also where they connected with the manholes, which openings were so large in some instances that they were not closed in the process of cementing the joints.

When the contractor reported the sewer as completed, said reinforced concrete portion of it contained a number of leaky joints, and a number of pipes were permitting seepage through the walls and joints thereof, by reason of which the city engineer declined to approve the sewer, and reported to the property owners that he would not approve it unless about 3,000 feet thereof was removed and properly constructed or the joints thereof caulked with lead and unless and until said seepage was reduced to not more than two and one-half inches. Thereafter the contractor made an ineffectual effort to stop the openings in the walls and joints of said sewer, but, notwithstanding such effort, water continued to flow in said sewer varying from four inches deep at the upper end to ten inches deep at the lower end of said

reinforced concrete portion, a substantial portion of which water seeped and flowed through the cracks, holes, and openings in the walls and joints thereof. The engineer inspected the sewer after the ineffectual effort to repair it, and thereafter on September 23, 1909, filed said report with said board, wherein he recommended that the sewer be accepted. This report was in part to the effect that the gross carrying and discharging capacity of the sewer was 13.75 cubic feet and the infiltration 3.44 cubic feet, the infiltration therefore being rather more than one-fourth of the gross capacity; that, notwithstanding such excessive infiltration, the capacity of the sewer was sufficient to accommodate the territory for all time to come; that for various reasons such infiltration would steadily decrease in quantity. At or before the time when said engineer reported the completion of said sewer as aforesaid, attorneys representing the property owners, in whose behalf this suit is brought, met with the members of said board informally, and said members thereupon informed said attorneys that no further steps would be taken in said proceeding until said attorneys had received prior notice thereof, but that said report was acted on and said primary assessment roll adopted as aforesaid without giving any notice to said attorneys and without any knowledge on the part of said attorneys, and in the absence of said attorneys, and when no one was present representing the property owners. The court finds that the board in accepting the sewer made no investigation on its own account as to whether the work had been properly done, but that it acted on the judgment of the engineer. The court finds also that said seepage continued practically the same in nature and quantity to the time of the trial, and that said sewer can be repaired

by caulking the open joints and replacing defective pipes, and that thereby it would be rendered serviceable for the intended uses and purposes. The specifications provided that as a prerequisite to the acceptance of said work, the contractor should be required to make and file an affidavit in addition to the certificate of the engineer, to the effect that the work had been completed according to the specifications. The court found that as a rule the board did not require such affidavit, and that it was not required or made in this case.

Heretofore in this opinion, authorities have been cited to the effect that the acceptance of an improvement by the board of public works,

1. after its completion, is conclusive on the property owner in the absence of fraud. Such conclusive effect of an acceptance extends to the character of the work done and material used. *Lux, etc., Stone Co. v. Donaldson* (1903), 162 Ind. 481, 485, 68 N. E. 1014. But, if fraudulent or procured by fraud, it is reviewable. *Town v. Gorman, supra; Gorman v. Johnson, supra*.

In *Lux, etc., Stone Co. v. Donaldson, supra*, it seems to be held that such an acceptance can be impeached only on account of the fraud of the accepting body in the act of acceptance, and that the prior or contemporaneous fraudulent conduct of others by which such acceptance is induced is not sufficient to that end, the reason assigned being that the complaining parties have a right to present to such accepting body every legal reason why the improvement should not be accepted, including all accusations of fraudulent conduct on the part of the engineer, contractor, etc. At least on first view, a later case (*Gorman v. Johnson, supra*), seems to be in conflict with *Lux, etc., Stone Co. v. Donaldson*. In the former it is said: "It has also

been argued that the only fraud, upon proof of which the order of acceptance could be set aside, is the fraud of the board of trustees; or, in other words, that a judgment can be set aside for fraud by the court, but not because of fraud upon the court by the prevailing party. That is necessarily not the law." *Gorman v. Johnson, supra*, has received the approval of the Supreme Court by the denial of a petition to transfer, and it is therefore recognized as sound both by that court and this.

In *Zorn v. Warren-Scharf Co.* (1908), 42 Ind. App. 213, 84 N. E. 509, an explanation of *Lux, etc., Stone Co. v. Donaldson, supra*, is suggested to the effect that the attack there was collateral. The attack in *Gorman v. Johnson, supra*, was direct, and such is the nature of the attack here. Perhaps it is well also to call attention to the scope of the hearing afforded by the statute under which *Lux, etc., Stone Co. v. Donaldson, supra*, was decided, as cited and construed therein. While doubtless, independent of statute, the board would have authority to grant a more comprehensive hearing, the statute involved here, and also in *Gorman v. Johnson, supra*, provides for a hearing at the stage of the proceedings under consideration only on the question of the amounts of the assessments and of special benefits. There is no provision for an appeal, but a landowner feeling aggrieved may obtain a review of his assessment on petition to the circuit court. §8725 Burns 1908, §8725 Burns 1914, Acts 1907 p. 563.

The finding here does not show actual fraud on the part of said board in accepting said work as completed, or that such acceptance was induced by positive fraud on the part of the engineer, contractor, or other person. However, an action-

able grievance can not be based on the mere
10. fact of fraudulent or wrongful conduct in a completed act. Unless such conduct results in injury to the complaining party, no action can be maintained. It therefore follows that the injury is a very substantial part of such a cause of action. In fact the injury may be so grave as to force the conclusion that the unex-

11. plained conduct that caused it is fraudulent.

Such fraudulent conduct so deduced is known as constructive fraud or fraud in law. It may exist in the absence of any real purpose or intention to do a wrong or to inflict an injury. It consists in "an act which the law declares to be fraudulent without inquiring into the motive." 20 Cyc 9.

An inference of fraud can not be deduced

12. from the mere fact that the improvement does not comply strictly with the specifications. As indicated earlier in this opinion, a substantial compliance satisfies the law. In determining whether there has been such a sub-

13. stantial compliance as repels an inference of fraud, some latitude must be allowed for the exercise of judgment on the part of the board, as otherwise to give the board the power to accept would be empty and useless. The power to accept then of necessity includes a right to exercise a discretion, but such discretionary power is not so broad as to authorize the board to bind the property owner by an acceptance of a work entirely different from that required by the contract or one that is totally worthless. Elliott, Roads and Streets (2d ed.) §586. "Much depends upon whether or not the improvement, as made, is such as to answer the intended purposes—as to whether or not the work, as done, will affect the usefulness of the improvement—and upon an answer to the question

as to whether the departure has been to the prejudice of the property owner." *McCain v. City* (1905), 128 Iowa 331, 103 N. W. 979; *Gage v. People, supra* (Ed. note, p. 923); Page & Jones, *Taxation by Assessment* §537.

There are defects in the sewer here, for the existence of which no excuse is offered or found.

As to some of them it would seem that

14. there could be no excuse. Thus, in the place of using pure, clean, sand and gravel of the quality specified, sand and gravel containing considerable portions of earth and loam were used in the manufacture of a number of pipes. The trial court found as a fact that such sewer pipes so manufactured were inferior in quality. The contractor was bound to know, and said engineer and the inspectors that assisted him should have known of the use of said impure material and of the consequent effect. Broken and cracked pipes were used, and as a result there were openings in the sewer. In some cases the joints were not closed by being cemented. It is found as a fact that the board, engineer, and contractor knew it to be of the highest degree of importance that a sewer such as this be constructed so as to exclude surface water, at least in excess of the amount found to be permissible. By calculation it may be ascertained that such permissible amount is about four and one-half per cent. of the capacity of the sewer, while the actual amount of seepage as reported to the board by the engineer is in excess of twenty-five per cent. of such capacity. The board, with knowledge of such fact and that said principle found to be of the highest degree of importance was thereby violated, accepted the sewer.

The trial court finds that said sewer can be properly completed by cementing the joints, etc., and that it will then be serviceable. The board

should have required this to be done before accepting the work. Under the circumstances, we hold that the acceptance of the sewer as complete is not binding on the complaining property owners. See the following: *McCain v. City*, *supra*; *City of Maryville, ex rel. Bank v. Lippman* (1910), *supra*; 4 *McQuillan, Municipal Corp.* §1929; *Tredwell v. City* (1896), 11 App. Div. 224, 43 N. Y. Supp. 458; *Meyers v. Wood*, *supra*; *Eiermann v. Milwaukee*, *supra*.

It may be said that the argument supporting our conclusion that on account of said unskillful work, and the use of the improper material, the contract has not been performed, applies with equal or greater force to the fact that such reinforced concrete pipes were substituted for such monolithic work. Ordinarily this would be true, but the facts found by the court are sufficient to justify said change in the method of construction, especially since the court found in substance that the substituted form of construction is as good as the specified, where the work is properly done.

The tenth conclusion of law is to the effect that Lizzetta Alsmeier and said sixty other appellants are estopped from contesting said assessment roll. Such estoppel is based on facts found by the court respecting each appellant, and deemed by the trial court sufficient to establish that each appellant respectively had knowledge of said change in method of construction, and neglected seasonably to protest against such change. Under our holding that the special existing circumstances justified the use of such reinforced concrete construction, the facts found as constituting such estoppel become unimportant. There is no answer presenting the issue of estoppel as directed against the fact of unskillful work and the use of poor material, resulting in a defective

sewer. Assuming, however, that such issue is presented, the facts found are not sufficient as a basis for a conclusion of estoppel as against such defective sewer, resulting from unskillful work and poor material, as aforesaid.

The facts are fully found by the court, and as a consequence it is not necessary that there be a new trial on reversal. If said acceptance be set aside, an opportunity will thereby be afforded the representatives of the contractor to complete the sewer as indicated by the finding. Thereafter, in any proceeding to procure the acceptance of the sewer as completed, the matter of any saving to the contractor, if any, by reason of the cost of said substituted method of construction, as compared with the cost of the specified construction, under ordinary conditions, can be adjusted. *Criswell v. Board, etc., supra.*

For error in the first and tenth conclusions of law, and consequent error in the ninth, the cause is reversed, with instructions to restate the conclusions to the effect that, under the circumstances presented by the finding, the board of public works must be held by its subsequent conduct to have ratified the substitution of such reinforced concrete construction for such monolithic construction, and, having so done, it acted within its authority under the special circumstances presented by the finding; that for unskillful work and the use of poor material, resulting in a defective sewer, as shown by the finding, the acceptance of said sewer and the making of said primary assessment roll and all subsequent proceedings thereon should be set aside as against plaintiffs and others for whom this action is brought as aforesaid, being said Lizzetta Alsmeier and said sixty other appellants and Margaret E. Adams and said 170 other appellees; that the costs should be taxed one-half thereof against said Margaret E. Adams

and said 170 other appellees, and one-half thereof against appellees Kuhn and Defrees, administrators.

ON PETITION FOR REHEARING.

CALDWELL, J.—Margaret E. Adams and the 170 other appellee property owners, hereinafter designated as appellees, in whose favor judgment was rendered by the trial court, appearing specially to that end, have petitioned for a rehearing and moved for a modification of the mandate entered on this appeal. The basis of the combined petition and motion by which such relief is sought, stated generally, is as follows: That the sole foundation of this appeal as prosecuted by appellants is the alleged error of the trial court in stating its tenth conclusion of law; that appellees filed in this court a confession of error as to said conclusion, whereby this court acquired jurisdiction over the persons of appellees only for the purpose of adjudicating respecting the correctness of such conclusion; that cross-errors were subsequently assigned by appellees Kuhn and Defrees, administrators, hereinafter designated cross-appellants, but that appellees were not served with notice of the same, and they did not appear thereto, and consequently that this court did not acquire jurisdiction over appellees in their relation to such cross-errors. Appellees ask as relief that on a rehearing being granted, the court modify the mandate by striking therefrom all that relates to appellees. In aid of the petition and motion the following facts sustained by the record, except as otherwise indicated by us, are brought to our attention: The judgment of the trial court consists of three paragraphs or specifications: By the first specification, which is based on the ninth conclusion of law, the city of Indianapolis, its officers and agents, the contractor, and all persons claiming under or through

him, are perpetually enjoined from taking any steps to collect assessments against the respective properties of appellees on account of said sewer, and the respective titles of appellees in and to said properties are quieted as against any lien or claim on account of said sewer or arising out of said assessments. By the second specification, which is based on the tenth conclusion of law, it is adjudged in effect that appellants are not entitled to a decree restraining and enjoining the collection of said sewer assessments as made against their respective properties, or quieting their title to such properties as against such assessments. The foundation of this specification is estoppel. By the third specification the costs are adjudged against the contractor and the city, except that the costs made by each appellant are adjudged against him.

Further facts brought to our attention respecting steps taken in 1913 are as follows: On June 11, appellants served appellees with notice of appeal. On June 14, appellants filed the transcript and proofs of notice and assigned error, and at the same time appellees confessed error. As we have said, the sole error assigned by appellants challenged the tenth conclusion of law. The confession of error as filed was several in form, and was to the effect that each appellee confessed that as far as he was informed or knew, appellants' assignment of error was true, and that the court did err in said conclusion. Wherefore, each appellee declined to defend this cause on appeal, and asked that no costs be taxed against him. Appellants' assignment of error is signed by one of the attorneys who afterwards filed briefs in behalf of appellants. The confession of error is signed by other attorneys. On July 22, appellants' briefs were filed. On September 5, the cross-

appellants assigned cross-errors and filed their briefs in answer and on their cross-errors. Appellants filed their reply briefs and in answer on the cross-errors September 30. November 1, the cross-errors were amended on petition filed October 6, and permission granted over opposition October 29. Appellees were not served with notice on the cross-errors or of the assigning thereof, and in no manner appeared thereto, save as hereinafter set out, and hence the argument that this court has not acquired jurisdiction over the persons of appellees to render any decision based on the cross-errors affecting their interests. It therefore becomes necessary to ascertain what relation appellees bear to the subject-matter of the cross-errors, and what attitude they have assumed on this appeal, and especially respecting the cross-errors. The cross-errors are to the effect that the court erred: (1) In overruling the demurrer to the complaint; (2, 3, 4, and 5 respectively) that the court erred in the first, second, seventh and ninth conclusions of law respectively. The substance of the first, ninth and tenth conclusions of law is set out in the original opinion. The second is to the effect that the act of the city officers in extending the assessment roll on account of said sewer and in entering it on the books of the city treasurer was wrongful and void as to all property owners who made seasonable objection to the manner in which the sewer was constructed; and the seventh, that the mere fact that the properties of certain parties who were property owners had been connected with the lateral sewers which empty into the Pleasant Run interceptor sewer does not constitute such an acceptance of the sewer as to preclude such parties from contesting the assessment against their respective properties. In their relation to appellants and appellees, it is apparent without elabora-

tion that the error and cross-errors assigned involve their interests as follows: That the tenth conclusion of law and the error assigned thereon by appellants affect appellants alone; that the ninth conclusion of law and cross-errors assigned thereon affect appellees alone; that the first, second, and seventh conclusions and cross-errors assigned thereon and cross-error assigned on the ruling on the demurrer to the complaint might affect both appellants and appellees; that is, appellants and appellees alike were interested in sustaining the ruling on the demurrer to the complaint, and the action of the court in deducing the first, second and seventh conclusions, but the ninth conclusion, which related only to appellees, did not particularly concern appellants, and the tenth conclusion, which related only to appellants, did not particularly concern appellees. Appellants and appellees indicated their attitude towards the ninth and tenth conclusions, in that appellants did not challenge the former on their appeal, and appellees confessed error as to the latter.

Such being the condition of the appeal, it is urged, as indicated, that notice to appellees of the assigning of cross-error was a prerequisite to juris-

15. diction over their persons. If appellees appeared to the cross-errors, or to the appeal in its relation to the cross-errors, it thereby becomes unimportant whether they were served with such notice. We, therefore, proceed to determine whether there has been such an appearance.

If there has been such an appearance by appellees, it consists in the nature and contents of the brief filed September 30, 1913, and denominated "Reply Brief of Appellants." This brief is in reply to the answer brief filed in behalf of the cross-appellants on appellants' assignment of error, and also in answer to the argument contained in that brief in support of the

assignment of cross-error. In so far as concerns the cross-errors, the "Reply Brief of Appellants" in the main is directed against assignments Nos. 1, 2, 3, and 4. As we have indicated, the nature of these assignments is such that, if sustained, two results would follow: (1) The judgment appealed from would not necessarily be reversed, even though the tenth conclusion of law considered alone were erroneous; (2) the foundation supporting the ninth conclusion of law would be undermined so that it could not stand if challenged by an assignment.

The fact of the first result justified counsel as representatives of appellants alone in defending against said assignments, and they could not thereby be held as representing appellees, even though the nature of such defense was such as appellees might well make in their own behalf as against such assignments. But said brief is broader than as indicated. It contains a complete argument in support of the ninth conclusion of law challenged by the fifth assignment of cross-error, and in which appellees alone are interested. Thus, on page 4 of such brief counsel declare their purpose to champion the cause not only of appellants, but also of appellees, using the following language: "So far as questions relating to the reversal of the judgment in favor of cross-appellants are concerned, the interests of the 171 appellees who recovered judgment pursuant to the ninth conclusion of law, and the 63 appellants who were denied relief, pursuant to the tenth conclusion of law, are identical, and the argument in favor of appellants on the cross-errors is also in favor of the 171 coparties in the trial court who are appellees here." Under the head of "Propositions Relied On", counsel by proposition No. 8 on page 7 declare their purpose to uphold the ninth conclusion of law by upholding the first conclusion. As stated, peti-

tioning appellees alone are interested in sustaining the ninth conclusion. On page 35 an argument is advanced in behalf of appellees to the effect that Kuhn is not shown to have any interest in the subject-matter of the litigation, and that in the absence of such interest he could not appeal from the judgment rendered, in favor of the petitioning appellees, "which was that 171 of the appellees recover costs and an injunction against Defrees and others." In the case at bar, an injunction was entered in favor of the appellees only. On page 39 counsel argue in justification of the injunction, and that authorities cited by the cross-appellants do not mitigate against the trial court's decision that the injunction issue. On page 56 counsel state a proposition in support of the ninth conclusion of law which is the immediate foundation of the judgment in favor of appellees, and the brief closes with a summing up in support of all the conclusions of law challenged by the cross-errors. It thus appears that the cause of appellees in its relation to the cross-errors was in fact fully presented for the consideration of this court, with no sort of an intimation that appellees were not thereby making a full appearance. On such presentation this court, as appears from the original opinion, considered and decided all the questions material to a complete determination of the issues arising on both the errors and the cross-errors assigned.

An attorney as a member of the firm whose name appears signed as attorneys for appellees to said confession of error, which firm represented

16. both appellants and appellees in the trial court, and signed, filed and presented the motion for a new trial and reserved exceptions to the conclusions of law for appellants, supports the petition for a rehearing and the motion to modify the mandate by

his affidavit. This affidavit recites, among other things, that his firm represented the petitioning appellees in the trial court; that as a member of such firm, he signed its name to the said confession of errors, and that thereafter neither he nor said firm took any part in the conduct of the appeal, or in defending it in behalf of appellees or otherwise. There is no statement in said affidavit, and it does not otherwise appear, that said other attorneys who prepared and filed said reply brief did not have authority to brief the cause in behalf of appellees. It is improbable, if not inconceivable, that they would do so and thereby procure this court fully to consider the cause in its relation to said appellees in the absence of such authority. In any event the fact remains undisputed and indisputable that the attorneys last mentioned did brief the appeal in full and in the interest of appellees. The contrary not appearing, it is presumed that they had authority to do so. 2 R. C. L. 325; 6 Cyc 488, and cases.

The brief being on the merits of the cause, and filed pursuant to such presumed authority, constituted an appearance. It follows that the petition for a rehearing should be denied, and the motion to modify overruled.

Petition for a rehearing denied, and motion to modify the mandate is overruled.

NOTE.—Reported in 105 N. E. 1033, 109 N. E. 58. Authority of attorney to bind client, 76 Am. Dec. 256; 30 Am. Rep. 358; 6 C. J. 631; 4 Cyc 928.

Terre Haute Paper Co. v. Terre Haute Water Works—62 Ind. App. 263.

TERRE HAUTE PAPER COMPANY v. TERRE HAUTE
WATER WORKS COMPANY.

[No. 8,531. Filed November 2, 1915. Rehearing denied April 18, 1916. Transfer denied June 2, 1916.]

1. **APPEAL.**—*Moot Question.*—*Suit to Restrain Act Done.*—Because of a dispute as to water rates, defendant threatened to cut off the water supply for plaintiffs automatic sprinkler system, a fire protection device, and suit was brought to restrain such action. After the filing of the suit and pending appeal, the defendants did cut off such water supply, and then, on the appeal, argued that only a moot question was presented. *Held*, that the question did not become moot, as the court had ample power to compel the defendant to furnish plaintiff water, and can not be deprived of jurisdiction by the commission of the wrongful act complained of after the filing of the suit and pending appeal. p. 268.
2. **WATERS AND WATERCOURSES.**—*Public Water Supply.*—*Duty of Company.*—In obtaining and accepting a contract with a municipality to supply it and its inhabitants with water for domestic use and fire protection a water company becomes impressed with a public duty to furnish a supply which shall be equal to all emergencies which may reasonably be anticipated, such as unusual droughts and conflagrations and to meet the enlarged demand incident to the increasing population of the municipality. pp. 270, 272.
3. **INJUNCTION.**—*Inefficient Injunction.*—*Granting.*—Where the order of the court could not correct the mischief complained of, an injunction will not be granted. p. 271.
4. **WATERS AND WATERCOURSES.**—*Public Water Supply.*—*Duty of Company.*—*Fire Protection.*—*Ordinance.*—A municipal ordinance authorized a company to operate a system of water-works to supply the city and its inhabitants with water and provided that a schedule of water rates be established by agreement or by arbitration. Pursuant to this ordinance there was established a schedule of rates to be charged the several classes of consumers, and it was determined that various kinds of shops and factories should pay, at meter rates, for the estimated quantity of water consumed where meters were not used. The plaintiff installed in its paper mill an automatic sprinkler system, a new fire protection device, and upon its refusal to install at its own expense water meters to measure the water consumed and to pay a fixed sum in addition to the meter rates, the water company threatened to cut off the supply, and the plaintiff brought suit to enjoin such action, asserting that under the contract with the city the defendant was obligated to supply water at meter rates, the quantity consumed to be estimated and there was no right, under the ordinance, to insist upon the installation of meters. Plaintiff also contended that the installation of

Terre Haute Paper Co. v. Terre Haute Water Works—62 Ind. App. 263.

meters would impair the efficiency of the fire protection afforded by the sprinkler system. *Held*, that the water company was obliged to furnish plaintiff with water at meter rates, the quantity consumed to be estimated, and that the ordinance did not require the installation of meters. p. 272.

5. **WATERS AND WATERCOURSES.**—*Public Water Company.—Duty.*—A water company, operating under a contract with a city to supply it and its inhabitants with water for domestic uses and for fire protection, is chargeable with the knowledge that new and improved devices for protection from fire are constantly being devised, and the mere fact that such improved apparatus enables a property owner to protect his property from fire at a lessened cost is no ground for increasing the price for furnishing the service which the water company has contracted to provide. p. 273.
6. **WATERS AND WATERCOURSES.**—*Public Water Supply.—Action to Protect Water Rights.—Evidence.*—The fact that a water company and plaintiff entered into a special contract for water service at a rate different from that provided in the schedule established by the city ordinance was not evidence that the water company had the right and authority, under its contract with the city, to designate certain kinds of service as a special service for which it might charge a greater rate than that provided for in the ordinance. p. 273.
7. **WATERS AND WATERCOURSES.**—*Public Water Supply Company.—Franchise.—Rights.*—A public service corporation has only such rights as its franchise defines. p. 274.

From Vigo Circuit Court; *James P. Hughes*, special judge.

Action by the Terre Haute Paper Company against the Terre Haute Water Works Company. From a judgment for the defendant, the plaintiff appeals. *Reversed*.

Stimson, Stimson, Hamil & Davis and McNutt, Wallace & Sanders, for appellant.

Lamb, Beasley, Douthitt & Crawford, for appellee.

SHEA, C. J.—This action was brought by appellant, Terre Haute Paper Company, against appellee to enjoin the latter from interrupting the flow of water from its water works to appellant's paper mill. The court rendered judgment that appellant was not entitled to the equitable relief sought and that

Terre Haute Paper Co. v. Terre Haute Water Works—62 Ind. App. 263.

appellee recover costs. The errors assigned and relied on for a reversal are: (1) The overruling of appellant's demurrer to the second paragraph of appellee's answer; (2) error of the court in ruling that the Hon. James P. Hughes had jurisdiction to hear and try the cause as special judge, and in overruling appellant's objection to said Hughes acting as special judge; (3) error of the court in its conclusions of law stated on the special findings of fact made; (4) the overruling of appellant's motion for a new trial; for judgment on the special findings of fact notwithstanding the conclusions of law; and for judgment on the evidence notwithstanding the special findings of fact and conclusions of law.

Briefly, the complaint charges in substance that on March 21, 1871, the city of Terre Haute adopted an ordinance authorizing appellee to operate a system of water-works to supply the city and its inhabitants with water, and for that purpose to lay pipes in all the streets of the city; that said ordinance requires that appellee shall maintain a high pressure of water in said pipes for the purpose of extinguishing fires, and shall furnish the citizens upon the several streets along which pipes may be laid, such quantity of water as they may desire, for which it shall have the right to charge a sum fixed by a schedule of rates of charges to be established by agreement between it and the city, or by arbitration; that pursuant to the provisions of said ordinance, a schedule of rates of charges was established in the manner prescribed, which is still in force; that said schedule fixes the rates of charges for water for certain uses and purposes specified in the schedule, and also a scale of rates for water when meters are used, and further provides that, in case of manufacturies of all kinds not specified and for all purposes not

provided for therein or in any ordinance of said city, and when meters are not used, there should be charged meter rates on the estimated quantities used; that appellant is a manufacturer of paper and has a paper mill located in the city of Terre Haute upon a street along which appellee has laid and is maintaining a pipe which is a part of, and is connected with its system of water-works; that appellant has now, and for several years has had in its paper mill, a system of pipes and automatic fire extinguishers connected with appellee's pipes in said street, through which water is delivered to it without the use of a meter, and desires to continue the use of said water for extinguishing fires by said automatic fire extinguishers, and for no other purpose; that the risk of fire in paper mills is very great, and fire insurance at any practicable rate, by responsible insurance companies, can only be obtained by appellant on its mill on condition that a system of automatic fire extinguishers shall be maintained therein, supplied with water under high pressure and through pipes unobstructed by meters or any device which would retard or diminish the flow of water to said extinguishers; that appellant is carrying a large insurance upon said mill, which would be liable to immediate cancellation in case any meter should be installed for the measurement of the water delivered to the fire extinguishers; that paper mills are not specified in the schedule of rates of charges for water furnished by appellee, nor is there any specified rate fixed for the use of water for the purpose of fire protection in paper mills or other private establishments, or for use by automatic fire extinguishers; nor is there any ordinance fixing a rate in such cases; that appellant is ready and willing to pay the meter rates established by the schedule, for the estimated amount of water furnished by appellee and used by

Terre Haute Paper Co. v. Terre Haute Water Works—62 Ind. App. 263.

it in the mill; that appellee now unlawfully demands that appellant shall at its own expense install meters at the mill for the measurement of the water delivered to the fire extinguishers, and pay therefor \$300 a year as a fixed charge, and meter rates in addition thereto for all water used, whether any water is used or not, and is unlawfully threatening to shut off the water supplied to said fire extinguishers unless appellant shall comply with said unlawful demand; that the installation of the meters would be an initial expense to appellant of about \$100 and the same would retard and diminish the flow of water to the extinguishers and increase the danger of the destruction of said mill by fire; that appellant's insurers have threatened to and will cancel appellant's insurance on the mill in case the meters are put in; that appellant has refused to comply with appellee's demand and appellee has threatened to and will cut off the water supply unless restrained from doing so by order of the court before notice can be given and a final hearing had herein. Appellant prays for a temporary injunction until a final hearing can be had; that appellee be perpetually enjoined from cutting off said water supply and for \$500 damages and all other proper relief.

The special findings of fact are very elaborate, and no good purpose can be served by setting them out in full. It is sufficient to say that it is found that appellee refused to continue the service under which water had been supplied for five years and demanded that appellant put in expensive meters and pay a minimum rate of \$300 per year in addition to the regular meter rate. Appellant refused to accept these terms, but offered to comply with the terms of the ordinance, which offer was refused by appellee. It is argued that because, since the filing of this suit and pending the appeal, appellee cut off

Terre Haute Paper Co. v. Terre Haute Water Works—62 Ind. App. 263.

the water supply, and also cut the pipes leading from appellant's mill to appellee's water plant, the record presents a moot question, and, therefore, under the well established rule, the court will not determine such question.

We can not agree with appellee's learned counsel in his reasoning upon this proposition. The record

does not present such moot question as

1. would authorize this court to refuse to consider the real questions involved. High on Injunctions (4th ed.) §23 lays down the following rule: "And where suit is begun before the doing of the wrongful act and during the pendency of the suit the act is done by the defendant, the court will not thereby be deprived of its jurisdiction." *Lewis v. Town of North Kingston* (1887), 16 R. I. 15, 11 Atl. 173, 27 Am. St. 724. We quote from the above case the following: "It ought not to be in the power of a defendant in an injunction bill to oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun."

If, on the other hand, appellee had furnished to appellant its supply of water upon the terms of the special agreement between them, or upon the terms and conditions of the ordinance, then a moot question would be presented which this court could not consider and the principle for which appellee contends would have application, but upon the record as it now stands, as heretofore stated, the questions are not moot. A question is moot when the judgment of the court could not accomplish the result prayed for. In this cause, the court has ample power by mandate to compel appellee to restore the pipes and furnish the water needed by appellant. *Lewis v. Town of North Kingstown, supra*; *Brauns v. Glesige* (1892), 130 Ind. 167, 29 N. E.

Terre Haute Paper Co. v. Terre Haute Water Works—62 Ind. App. 263.

1061; *Whiteman v. Fayette Fuel-Gas Co.* (1891), 139 Pa. 492, 20 Atl. 1062; *New Haven Clock Co. v. Kochersperger* (1898), 175 Ill. 383, 390, 51 N. E. 629; *Ogborn v. City of Newcastle* (1912), 178 Ind. 161, 98 N. E. 869.

Elaborate and very able briefs have been filed by counsel on both sides, and an exhaustive special finding of facts with conclusions of law stated thereon is in the record. The decision of a very few questions will, in the judgment of this court, however, determine all the questions so ably presented by counsel in their briefs: (1) Was the water company obliged, under the terms of the ordinance to furnish water to appellee in such quantities as it might desire in its paper mill, as shown in the complaint? (2) Was appellee within its rights in demanding that a special contract should be entered into in terms indicated by it before it was obliged to furnish water and pressure demanded by appellant?

The material parts of the ordinance mentioned in the complaint are as follows: "Be it ordained by the common council of the city of Terre Haute; that the Terre Haute Water Works Company, a corporation organized in the month of March, in the year one thousand eight hundred and seventy-one, under the laws of the State of Indiana, and its successors be and hereby are exclusively authorized and empowered to construct, maintain and operate water works in the city of Terre Haute, to supply said city and its inhabitants with pure and wholesome water; to acquire and hold, as by law authorized, any real estate, easements and water rights necessary to that end and purpose, and to use the streets, alleys, avenues and public grounds of said city of Terre Haute, as it now is or hereafter may be laid out and enlarged, for the purpose of laying

Terre Haute Paper Co. v. Terre Haute Water Works—62 Ind. App. 263.

therein pipes and conduits necessary to carry and convey water throughout said city.

“Section 3. That in the construction of said water works the company shall adopt that system known as the Holly Water Works, or some other approved system, in their discretion; and shall maintain the same in such condition as to be capable of throwing six streams at once, one hundred feet vertically through one inch nozzles; that the company shall erect for fire purposes at least two double fire plugs to each square along the streets wherein their pipes may be laid. Said fire plugs shall be entirely under the control of the City Council and the Fire Department appointed by it, and moreover said company shall lay pipes along such streets as the Common council may require on reasonable notice as to the time and condition of the ground for work of that character.”

Appellee, in obtaining and accepting a contract with the city of Terre Haute to supply the city and its inhabitants with water for domestic

2. use and fire protection, became impressed with a public duty. *Central Union Tel. Co. v. Fehring* (1896), 146 Ind. 189, 45 N. E. 64; *City of Rushville v. Rushville, etc., Gas Co.* (1892), 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; *Central Union Tel. Co. v. State, ex rel.* (1891), 118 Ind. 194, 19 N. E. 604, 10 Am. St. 114; *Portland Nat. Gas & Oil Co. v. State, ex rel.* (1893), 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639; *Indiana, etc., Gas Co. v. State* (1901), 158 Ind. 516, 519, 63 N. E. 220, 57 L. R. A. 761; *Indiana, etc., Gas Co. v. Anthony* (1900), 26 Ind. App. 307, 58 N. E. 868; *Greenfield Gas Co. v. Trees* (1905), 165 Ind. 209, 211, 75 N. E. 2; *Coy v. Indianapolis Gas Co.* (1896), 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *Pond v. New Rochelle Water Co.* (1906), 183 N. Y. 330, 76 N. E. 211, 1 L. R. A.

Terre Haute Paper Co. v. Terre Haute Water Works—62 Ind. App. 263.

(N. S.), 958, 5 Ann. Cas. 504; *Condon v. New Rochelle Water Co.* (1908), 116 N. Y. Supp. 142; *State v. Cadwallader* (1909), 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

In 4 McQuillan, Municipal Corp., 3573, this language is used: "It was said by Chancellor Pitney in *Long Branch Commission v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474, in speaking for the court of chancery of New Jersey, that: 'A company which seeks and obtains a franchise to supply a certain territory with water for public and domestic uses is under a moral, and in my judgment a legal, obligation to furnish a supply which shall be equal to all emergencies which may be reasonably anticipated, including unusual droughts and unusual conflagration, and to bear constantly in mind the prospective increase in population and a consequent increased demand for water.' "

It is the rule that an injunction will not be granted where the order of the court could not correct the mischief complained of and the authorities

3. cited by appellee in the very able brief of counsel go no further than this but, as above stated, no such case is presented by this record. *State, ex rel. v. Board* (1899), 153 Ind. 302, 54 N. E. 809; *Princeton, etc., Co. v. Gilmore* (1907), 170 Ind. 366, 83 N. E. 500.

If the provisions of the ordinance are sufficiently broad to cover the demands made upon appellee by appellant, then appellant was within its rights in demanding that it be supplied with water under the ordinance. The general provisions of the ordinance seem to contemplate that water shall be supplied to all persons resident of the city of Terre Haute who make demand therefor. Where the rate is not provided for, the charge shall be at meter rates on the estimated quantity used. In the schedule of

rates this language is found: "Distilleries, foundries, machine shops, locomotives, soap or starch works and manufacturies of all kinds, not specified in the above or following list, and for all other purposes not provided for herein, or in ordinances of the city of Terre Haute, in favor of the Terre Haute Water Works Company, will be charged meter rates on the estimated quantities they use (where meters are not used)." This language clearly shows that it was contemplated that water should be served without the use of meters, at meter rates, the quantity used to be estimated. In this case, it could have been accurately ascertained, as it was pumped into a tank, the capacity of which could be easily measured.

It is the judgment of this court that appellee was obliged to furnish appellant with water in accordance with this provision. There is no

4. provision of the ordinance which gives appellee authority to require patrons to use expensive meters and pay an extra price in addition, as was attempted in this case. *New Haven Clock Co. v. Kochersperger, supra*; *Pond v. New Rochelle Water Co., supra*. The theory upon which private ownership of a public utility,

2. such as a water plant, can be justified is that said private owners shall supply to the city and its inhabitants fire protection, as well as wholesome water, which the ordinance and franchise in this case provides. Neither do we think appellee company was within its rights in refusing to furnish the service which was demanded by appellant in this case simply because it also furnished fire protection. The chief complaint seems to be that appellant was receiving fire protection too cheaply. The very purpose of its existence is that it shall furnish to the city as well as its inhabitants such service. The mere fact that there was no such fire apparatus in

Terre Haute Paper Co. v. Terre Haute Water Works—62 Ind. App. 263.

existence at the time the ordinance was entered into does not in our judgment affect the case. The contract was accepted with full knowledge that

5. improvements in fire apparatus for protection were occurring each day; that the ingenuity of man was taxed to protect the lives and property of inhabitants of populous cities. The ordinance was accepted with that knowledge. The mere fact that this apparatus enabled the owner to protect his property at a lessened cost in no sense justifies appellee in increasing the price at which it will furnish service which it has contracted to give. We do not

think it was ever intended by the ordinance, 6. at least it can not be gathered from reading it, that appellee was to be given arbitrary power to say that this case or that case was a special service, for which it might charge a different and greater price. The fact that they had entered into a special contract prior thereto, for such service, is not evidence that such authority was recognized, but is rather evidence of a disposition to adjust matters amicably. The fact that appellee has executed special contracts with other manufacturing establishments and business enterprises in the city, which were entitled to protection under the ordinance, is no argument that they were authorized under the law to do so. As stated above, we think the ordinance clearly contemplated that the water connection should be made upon the terms indicated in the ordinance. The mere fact that incidentally fire protection is also furnished can not be offered as an excuse for charging another or greater price for such service. The fact that only a small quantity of water is used except in case of fire we think is not an argument to sustain appellee's position. No water is used from fire hy-

drants in the city except in case of fire, and we venture to say there are very many fire hydrants in the city of Terre Haute which have never been used. These are matters of common knowledge to which the court can not shut its eyes. A public service corporation has only such rights as its fran-

7. chise defines. *Western Paving, etc., Co. v. Citizens St. R. Co.* (1891), 128 Ind. 525, 530, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. 462.

Numerous questions are ably presented upon the admission of and refusal to admit evidence, also as to the rulings of the court upon demurrers to the pleadings, and as to the special findings of fact and conclusions of law stated thereon, which, in view of the conclusion we have reached, need not be discussed. The court erred in stating its conclusions of law. The ends of justice will be subserved by granting a new trial, directing further proceedings not inconsistent with this opinion. Judgment reversed.

NOTE.—Reported in 110 N. E. 85. Liability of water companies for nonperformance of contract with municipality, 18 Am. St. 380. Rights and duties of water companies as to payment for meter as a condition to supplying water, 15 Ann. Cas. 378; Ann. Cas. 1915C 1198. See, also, under (1) 3 C. J. 361; 2 Cyc 534; (2) 40 Cyc 774, 791; (3) 22 Cyc 781; (4) 40 Cyc 795, 803.

NAVE v. POWELL.

[No. 8,786. Filed January 6, 1916. Rehearing denied March 6, 1916. Transfer denied June 2, 1916.]

1. APPEAL.—*Briefs.—Reference to Assignment of Error.—Specifications.*—Where appellant, in his brief, fails to make specific reference to any assigned error and makes no attempt to apply his propositions of law to any assigned error except in one instance, the other assigned errors are waived. p. 277.
2. APPEAL.—*Briefs.—Grounds of Review.—Ruling on Motion for New Trial.*—Where the only reference to the ruling on the motion for a new trial in appellant's points and authorities is a statement that "there were rulings on certain instructions referred to in the

new trial as to the time when a sale in the case was effected and under that head the following authorities are cited", followed by a statement of two separate propositions of law and citation of authorities in support thereof, presents no question on the ruling on such motion. p. 277.

3. **APPEAL.—Effect of Decision on Prior Appeal.**—"Law of the Case."—Where no substantial changes are made in pleadings by amendment thereto, the only amendment to the complaint being as to the amount of attorney's fees, the decision in a prior appeal, in so far as the pleadings are concerned, must be considered as the law of the case, but this is not true, however, if the theory of the pleading or any material averment thereof is changed by amendment so as to present an essentially different question of law. p. 279.
4. **APPEAL.—Effect of Decision in Prior Appeal.**—"Law of the Case."—Where, on a prior appeal of a cause, the decision of the court determined the construction of a written contract of warranty of a stallion and decided that the remedy provided therein was exclusive and must be so treated in the consideration of any pleading based thereon or involving the construction thereof, such decision is the law of the case in so far as any question concerning the construction of such contract of warranty, or any pleading based thereon, is concerned. p. 282.
5. **ACTION.—Joinder of Causes.**—While it is a general rule that two separate independent causes of action, one based on tort and the other on contract, can not be joined in the same proceeding, this rule has no application in such a case as the one at bar, wherein a pleading based on a breach of warranty and a pleading based on fraud grew out of the same transaction, and such pleadings may be properly joined in separate paragraphs of the same complaint or answer. Under the provisions of §352 Burns 1914, §347 R. S. 1881, the rule as to joinder of defenses is more liberal and comprehensive, if anything, than as to the joinder of causes of action. p. 283.
6. **ELECTION OF REMEDIES.—Breach of Warranty.—Fraud.**—Where, in an action to enforce collection of notes given in payment of the purchase price of a warranted stallion, defendant elected to rely on a breach of the warranty as a defense, which defense did not exist in fact by reason of the death of the stallion before a certain date in the warranty, he did not thereby estop himself, on a second trial of the cause, under the doctrine of the election of remedies, from pleading and relying on fraud as a defense, for to render such doctrine applicable to any particular case, two things are essential: First, two remedies must be available; and, second, such remedies must be inconsistent, and, if the party, in whose favor the right of election exists, by any decisive act, with knowledge of all the facts and his rights thereto, chooses his remedy, such choice is final and absolute and bars his right to later choose the other remedy. But where, as in the case at bar, the party

erroneously thinks he has a remedy that does not in fact exist, a mistaken selection and prosecution of such remedy will not estop a later election to pursue an appropriate remedy, though it be inconsistent with the one formerly prosecuted. p. 284.

7. SALES.—*Warranty.—Merger of Misrepresentations.—Pleading.—Sufficiency of.*—While it is the law that, where a vendee of property accepts from a vendor a written contract of warranty which contains certain warranties as to the quality of the thing sold and a provision therein for an exclusive remedy for the breach of such warranty, a voluntary election by the vendee to accept and rely on such contract, in the absence of fraud in procuring the execution and acceptance of such warranty, estops the vendee from afterwards pursuing a remedy based on the fraud of the vendor in making the representations intended to be and actually covered by the contract of warranty, since such oral representations are merged in the written contract; yet, if, as in the instant case, the pleadings of the vendee aver that the written warranty was no part of the original contract for the purchase of the horse, but was voluntarily delivered, without consideration, along with the horse, and that the execution of such contract of warranty was a part of the fraud practiced by the vendee, such pleadings are sufficient as against demurrer, and, upon the facts averred therein, the vendee is not estopped from relying on fraud as a remedy. p. 288.

From Miami Circuit Court; *Nott M. Antrim*, special judge.

Action by Alton P. Nave against Oliver M. Powell. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Charles R. Milford and *J. Ernest Rodenbeck*, for appellant.

Cox & Andrews, for appellee.

HOTTEL, J.—This is a second appeal by appellant in an action brought by him to recover on two promissory notes given by appellee for the purchase of a stallion. There was a judgment below for appellee on his cross-complaint in the sum of \$200. Twelve separate rulings of the trial court, including the ruling on the motion for new trial, are assigned as error in this court, but the questions presented thereby for our determination are expressly limited by appellant in his brief, under the heading "Points

and Authorities," as follows: (we quote) "Under the assignments of error numbered 1, 2, 6, 7, 8, 9 and 10, all of which refer to the alleged error of the lower court in the several rulings on the different pleadings, substantially the same question is involved, namely, the right, privilege and legality of the pleading of fraud in this cause at this time. The appellant contends that under the contract as existing between the parties, under the conditions as heretofore made in the first trial of this cause, and decided by the Appellate Court of Indiana, that it was then too late and improper for appellee to raise the issue of fraud, and on that point and the overruling of the motion for a new trial the following authorities are cited by appellant:—"

The appellant follows this statement with numerous general propositions of law and citation of authorities applicable to the question which

1. he suggests as the one presented by the rulings on the several demurrers to the pleadings.

No specific reference is made to any assigned error, nor is there any attempt to apply his propositions of law to any assigned error except as indicated in the above statement. The other assigned errors are therefore waived. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 626, 103 N. E. 652; *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218, and cases cited.

The motion for a new trial contains fifty-three grounds and the only reference to the ruling thereon in said points and authorities is a statement

2. that (we quote) "there were rulings on certain instructions referred to in the new trial as to the time when a sale in this case was effected, and under that head the following authorities are cited:—" Then follows a statement of two separate propositions of law and citation of authorities in support

thereof. Such statement, under the frequent holdings of the Supreme Court and this court, presents no question on the ruling on said motion. See cases cited *supra*.

It follows that the only question which we are required to determine in this case is that above indicated in our quotation from appellant's brief, and to such question this opinion will be limited. For the purposes of determining this question, we deem it unnecessary to set out the several pleadings to which the said respective demurrers were addressed, but instead will state more fully appellant's contention. It is claimed by appellant that by reason of the questions presented on the former appeal and the decision of this court in respect thereto, it was "too late and improper for appellee to raise the issue of fraud on the second trial."

With respect to this question, appellant states his contention as follows: "Appellee did not have the right * * * after having made his election in the former trial to stand on his contractual right, to entirely change the remedy, * * * and * * * rely upon his remedy in tort; * * * that appellee did not claim that he had not made an election by his pleadings and defense in the first trial, but he relied solely on his right to change his theory on the fact that an alleged amended complaint was filed." Appellant further insists, in effect, that on the former appeal "appellee relied on the contract of warranty executed and delivered by appellant, and (that) this court held that the remedy provided in that contract was exclusive"; that such holding is the law of the case and is conclusive against appellee's right to file amended answers and cross-complaint predicated on fraud.

In answer to the contention last indicated, appellee says, in effect, that the record discloses that,

after judgment of this court on the former appeal was certified to the trial court, the latter court entered an order in accord with such judgment, and appellant then, by leave of court, amended his complaint and thereby rendered inapplicable the doctrine for which he contends. The character of the amendment controls this question. If no substantial changes were made in the respective pleadings

3. by the amendments thereto, the former decision, in so far as such pleadings are affected thereby, must be recognized as the law of the case. *Hatfield v. Cummings* (1898), 152 Ind. 537, 53 N. E. 761; *Terre Haute, etc., R. Co. v. Zehner* (1901), 28 Ind. App. 229, 62 N. E. 508; *Shirk v. Lingeman* (1900), 26 Ind. App. 630, 59 N. E. 941; *Indiana Traction Co. v. Pring* (1912), 50 Ind. App. 566, 578, 96 N. E. 180, and cases cited; *Alerding v. Allison* (1907), 170 Ind. 252, 260, 261, 83 N. E. 1006, 127 Am. St. 363. If, however, the amendments change the theory of the pleadings, or any of the material averments thereof, so as to present a law question essentially or materially different from that determined by the former appeal, the doctrine that such decision is the law of the case, can, of course, have no application. *Indiana Traction Co. v. Pring, supra*; *Alerding v. Allison, supra*. It appears from the record that the only amendment of the complaint was one as to the amount of attorney's fees. This could in no way change or affect the question presented and decided by the former appeal. It follows that, unless the averments and theory of appellee's amended answers and cross-complaint are such as to render inapplicable said doctrine, it must control the case.

As before indicated, these pleadings are predicated on fraud. The character and nature of the pleadings involved in the former appeal and the law ques-

tion determined in relation thereto will be best understood by an examination of that opinion. *Nave v. Powell* (1912), 52 Ind. App. 496, 96 N. E. 395. That opinion will disclose that, on account of certain deficiencies in appellant's brief, the court expressly limited the questions to be considered to rulings on appellee's demurrer to appellant's reply to appellee's first paragraph of answer and the rulings on appellant's demurrers to appellee's sixth paragraph of answer and third paragraph of cross-complaint, and also indicated that, in considering such rulings, it would only be necessary to interpret and construe the written warranty involved in such pleadings. After setting out the first paragraph of appellee's answer, the court in the opinion said: "The theory of this paragraph * * * is an implied warranty of the breeding qualities of said stallion by plaintiff at the time of the sale, and a breach thereof." The substance of the reply addressed to such paragraph of answer, and the written warranty made part thereof and the substance of appellee's sixth paragraph of answer and third paragraph of cross-complaint, each of which were also predicated on such written warranty, are then set out, after which the court says: "It will be seen * * * that the question presented by the rulings on the demurrers thereto turns on the construction to be placed on said contract of warranty." After discussing the respective contentions of the parties relating to the construction to be placed on such contract of warranty, the court said: "*We are forced to the conclusion that in the matter of the provision for the remedy for the breach of the warranty the contract is exclusive, and that appellee is restricted to the remedies therein contained, and that the court below therefore erred in overruling appellant's demurrers to the sixth paragraph of answer and the third*

paragraph of cross-complaint, respectively, and also in sustaining appellee's demurrer to appellant's special reply to the first paragraph of answer.

"Inasmuch as this case must be reversed for these errors, we have not examined the other paragraphs of the pleadings with a view of determining their sufficiency, and express no opinion thereon, further than to say that the construction placed on the written warranty and contract of insurance is the law of the case applicable to all the pleadings the same as to those expressly considered and ruled on.

"The judgment is therefore reversed with instructions to the court below to sustain the demurrer to appellee's sixth paragraph of answer and third paragraph of cross-complaint, and to overrule the demurrer to appellant's special reply to appellee's first paragraph of answer, and for further proceeding not inconsistent with this opinion."

Appellant contends, in effect, that the opinion expressly holds and limits appellee's remedy in this case to that provided by his written warranty and hence that appellee could have no defense or cause of action predicated on fraud. This contention results from appellant's attaching to the italicized language, above quoted, an unwarranted meaning and effect. Such language must be considered in connection with what immediately precedes and follows it, and when thus considered it seems to us there can be no doubt, or uncertainty as to its meaning, viz., that the warranty relied on by appellee had been reduced to writing and was controlled thereby; that such writing, the construction of which was the real thing being considered, was exclusive as to the remedy provided therein, and hence that any defense or cause of action based on warranty would likewise be so limited.

None of the pleadings, then before the court and

being considered by it, were predicated on fraud. There was no defense or counterclaim other than those based on warranty and the exclusive remedy referred to by the court necessarily referred to the remedy provided by the contract of warranty and nothing else. To construe and interpret appellee's contract of warranty and say that the remedy provided therein is exclusive is one thing; to determine whether appellee might have some remedy other than that based on a breach of warranty is another and very different thing. The former was determined by the court in the former opinion; the latter was not considered by it.

The language of the opinion that the construction placed on the written warranty is the law of the case applicable to all the pleadings the same

4. as those expressly considered necessarily referred to only such pleadings as were based on such written warranty, or such as involved a construction thereof. What precedes this language clearly shows that the court then had in mind the fact that there might be a pleading sufficient on some theory other than that based on warranty, otherwise the statement "we have not examined the other paragraphs of the pleadings *with a view of determining their sufficiency*," (our italics) would be wholly unnecessary and meaningless. The decision of this case on the former appeal does determine the construction to be placed on said written contract of warranty, and decides that the remedy therein provided is exclusive and must be so treated in the consideration of any pleading based thereon or involving a construction thereof. To such extent, but no further, is such former decision the law of the case.

With respect to the other questions involved in his contention above set out, appellant insists, in

effect, that a "defense, or cause of action, predicated on breach of warranty and a defense, or cause of action, growing out of the same transaction, predicated on false representations can not be joined in the same action, for either of two reasons, viz.: (1) Because one is based on contract and the other on tort; and (2) because such causes of action or defenses are inconsistent and the election of the one precludes the right to pursue the other. Upon these propositions of law, appellant predicates an argument to the effect that appellee, by originally electing to proceed to trial and final judgment in the trial court on pleadings based on breach of warranty, thereby estopped himself from afterwards, on a second trial, shifting the theory of his pleadings to that of tort based on fraud.

It is true, generally speaking, that two separate independent causes of action, one based on tort and the other based on contract, may not be

5. joined in the same proceeding. *Cincinnati, etc., R. Co. v. Harris* (1878), 61 Ind. 291; *Boyer v. Tiedeman* (1870), 34 Ind. 72. Such rule, however, has application to *separate independent causes of action* and not to cases like that here involved, where a pleading based on a breach of warranty and a pleading based on fraud grew out of the same transaction. In the latter case, the pleadings may be joined in different paragraphs of the same complaint or answer. In discussing a case where a like question was involved, the Supreme Court of Ohio in the case of *Gartner v. Corwine* (1897), 57 Ohio St. 246, 48 N. E. 945, said: "Whether there is more than one cause of action stated in the petition, is a question upon which differences of opinion may exist. But it need not now be determined. *If there are two, one for breach of the warranty, and the other for fraud, they grew out of the*

same transaction, and may be properly joined in the same petition; and no motion having been made to require them to be separately stated, that objection to the petition, if it were open to it, was waived by answer. In favor of the view that there is but one cause of action stated, it may be said, there was but a single transaction between the parties—the negotiations resulting in the sale of the horse; there was but one wrong of the defendant—the sale of an unsound animal as and for a sound one; and there is but one right of the plaintiff growing out of the wrong, and that is, to have redress for the injury he has sustained.” (Our italics.) See, also, 31 Cyc 431 and cases cited in note 99. As to joinder of defenses, the rule, if anything, is more liberal and comprehensive in this State by reason of statutory enactment. §352 Burns 1914, §347 R. S. 1881; *Ray v. Moore* (1899), 24 Ind. App. 480, 56 N. E. 937; *Johnson v. Sherwood* (1904), 34 Ind. App. 490, 73 N. E. 180; *Fudge v. Marquell* (1904), 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; *Field v. Brown* (1896), 146 Ind. 293, 45 N. E. 464. These cases, we think, dispose of appellant’s contention in so far as it is based on the unqualified proposition that, in the same action, a pleading based on tort may never be joined with a pleading based on contract.

In support of his contention that appellee by electing to stand on his contract of warranty in the first trial of this case, thereby estopped him-

6. self from later asserting and relying on fraud, appellant invokes the doctrine of election of remedies. This doctrine “rests upon the principles that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who

manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument and then repudiate it." *Peters v. Bain* (1890), 133 U. S. 670, 695, 10 Sup. Ct. 354, 362, 33 L. Ed. 696. To render such doctrine applicable to any particular case, two things are essential, viz., (1) two remedies must be available; and (2) such remedies must be inconsistent. *Marsh Bros. Co. v. Bellefleur* (1911), 108 Me. 354, 81 Atl. 79; *Whitley v. Spokane, etc., R. Co.* (1913), 23 Idaho 642, 132 Pac. 121; *Blank v. Independent Ice Co.* (1911), 153 Iowa 241, 133 N. W. 344, 43 L. R. A. (N. S.), 115; *Brown v. Fletcher* (1910), 182 Fed. 963, 105 C. C. A. 425; *Kinney v. Kiernan* (1872), 49 N. Y. 164; *McNutt v. Hilkins* (1894), 29 N. Y. Supp. 1047.

If the party, in whose favor the right of election exists, by any decisive act, with knowledge of all the facts and his rights in relation thereto, chooses his remedy, such choice is final and absolute and bars his right to choose the other remedy afterward. *Blank v. Independent Ice Co.*, *supra*; *Nysegander v. Lowman* (1890), 124 Ind. 584, 24 N. E. 355; *Leach v. Adams* (1898), 21 Ind. App. 547, 52 N. E. 813; *Bunch v. Grave* (1887), 111 Ind. 351, 12 N. E. 514; *American Car, etc., Co. v. Smock* (1911), 48 Ind. App. 359, 91 N. E. 749, 93 N. E. 78; 7 Ency. Pl. & Pr. 363-364; 15 Cyc 259, 260.

The doctrine, however, has no application where a party erroneously thinks he has a remedy that does not in fact exist, and, a mistaken selection of such a remedy, though it be prosecuted until adjudged inapplicable, will not foreclose or estop an after election to pursue an appropriate remedy, though the latter be inconsistent with the one fruitlessly prosecuted. *Bunch v. Grave*, *supra*; *Marsh*

Bros. Co. v. Bellefleur, supra; Whitley v. Spokane, etc., R. Co., supra; Blank v. Independent Ice Co., supra.

The cases of *Cohoon v. Fisher* (1896), 146 Ind. 583, 588, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193, and *Gartner v. Corwine* and other cases above cited are holdings to the effect that there is not necessarily such an inconsistency between a pleading based on fraud and a pleading based on breach of warranty growing out of the same transaction as will prevent their being joined in the same action, and, in any event, for reasons hereinafter indicated, it is immaterial in the instant case whether, under the particular facts set up in the pleadings under consideration, the remedy now selected and sought to be enforced by appellee is inconsistent with that selected and pursued at the former trial. This is so, because both the pleadings under consideration, and the evidence, show that said stallion was purchased in April 1904, and died on November 4, of the same year; that his barrenness as a breeder was not known until after the latter date. The written warranty, involved in the former appeal and now pleaded by appellant by way of reply to appellee's answer, provides as follows: "In the event that the above named stallion in perfect health with proper usage and the mares to him regularly returned and tried or bred on one full service season trial, does not get with foal 50 per cent. of the producing mares regularly tried and bred to him, then on the return of said stallion to me at Attica, Fountain County, Indiana, during the first week of the month of April next following the full service season first concluded after the date thereof in good health and condition, I agree to furnish the above named purchaser without further charge another imported or pure bred stallion of equal value in exchange * * *. In the event

that the conditions of the above agreement are not faithfully performed or should the above named stallion hereafter become injured or disabled, through accident or disease * * * this warranty shall be null and void and of no effect, and all obligations incurred by me herein shall be considered fulfilled and ended. This bill of sale contains all the agreements of warranty or guaranty made by me in the sale of the above mentioned stallion, and it is expressly provided that I shall not be liable for any claim that may hereafter be made alleging any verbal agreement of myself or agent in the sale of said horse."

The former opinion is decisive of the question that, in an action based on such written warranty, the remedy therein provided is exclusive. Upon such question and to such extent the former decision is the law of the case.

The death of the stallion before the expiration of the time fixed for ascertaining his breeding qualities and before the expiration of the time fixed by the contract for his return, precluded such return after the breach of the contract was ascertained and known by appellee, and, under the latter provision of the contract, above quoted, rendered the contract of warranty null and void and of no effect. Therefore, it follows that, when appellee elected to pursue the remedy provided in the contract of warranty, no such remedy existed, and hence, under the cases, *supra*, there could be and was no election of remedies.

There is still another phase of this case which, though possibly not strictly included in appellant's question first indicated herein as the one to be determined, is suggested by and involved in his contention that the former opinion in this case is a holding to the effect that the contract of warranty furnished appellant his sole and only remedy in this

case. Such contract does in fact cover the breeding qualities of the stallion sold by appellant. It is also true that the representations now relied on by appellee as being false and fraudulent are those which relate to such breeding qualities of the horse. In the former opinion we held, in effect, and correctly we think, that the implied warranty set up in one of the paragraphs of answer had

7. been merged in the express written warranty, and hence that appellee's remedy, so far as breach of warranty was concerned, was limited to that provided in such contract. By analogy of reasoning, it would seem to follow that where the vendee of property accepts from the vendor an express written warranty which contains certain representations or a warranty as to a particular quality or element of fitness of the property or thing sold for the purpose for which it is sold, and a provision therein for an exclusive remedy for the breach of such warranty, a voluntary election by the vendee to accept and rely on the contract of warranty, *in the absence of fraud in procuring the execution and acceptance of such contract*, estops the vendee from afterwards asserting and pursuing a remedy based on the fraud of such vendor in the making of the identical representations intended to be and actually covered by the contract of warranty. In other words, where the fraudulent representations relied on as the inducement which caused the vendee to purchase the thing sold to his injury are identical with, and completely covered by, a written warranty and provisions for the breach thereof taken and accepted by such vendee, the verbal representations are merged in the writing and the writting, *unless tainted by the fraud*, will be deemed to express the full intent of the parties with reference thereto. Upon this subject the Court of Civil Appeals of

Texas, in the case of *Oltman Bros. v. Poland* (1912), 142 S. W. 653, in discussing the effect of warranty say: "This writing contained the entire contract between them, and by its terms each must abide. * * * Contracts containing similar provisions to this have been before this court in a number of cases, and it has uniformly been ruled that, when the parties to a contract agree upon the remedies that accrue for a breach of it, these remedies constitute the only relief in the particular that the purchaser has, and he must look to his contract and be governed by its stipulations." To the same effect, see, *Wisdom v. Nichols, etc., Co.* (1906), 139 Ky. 506, 97 S. W. 18; *Walters v. Akers* (1907), (Ky.), 101 S. W. 1179; *Miller v. Nichols, etc., Co.* (1877), 5 Neb. 478.

The cases cited, while recognizing and announcing the legal principle contended for by appellant, expressly except from its application, those cases in which the fraud charged is alleged to have induced both *the acceptance of the contract of warranty* and the purchase of the property sold and covered by such warranty. It was expressly held, in the case last quoted from, that there was no fraud on the part of Oltman Bros. in inducing Poland to accept the warranty.

In the instant case, the pleadings of appellee, both his answer and cross-complaint, contain averments to the effect that the written warranty was no part of the original contract of purchase and sale of the horse, but that afterwards, at the time of the delivery of the horse under circumstances particularly set out, such contract of warranty was, without any consideration, voluntarily included among other papers delivered to appellee by appellant, and that *such execution of said contract was a part of and one of the steps in the fraud practiced by appellant.*

There is also a reply containing the same or similar averments addressed to that paragraph of appellant's answer to the cross-complaint, which was predicated on such contract of warranty. We think the averments contained in appellee's said pleadings were sufficient to bring them within the class excepted from the application of the principle announced in the cases, *supra*, and hence render such pleadings sufficient against demurrer.

The record as presented by appellant's brief presents no reversible error and the judgment below is therefore affirmed.

NOTE.—Reported in 110 N. E. 1016. See under (3), (4) 3 Cyc 395, 401; (5) 1 C. J. 1087, 23 Cyc 417; (7) 20 Cyc 89; 35 Cyc 443, 444. Warranty on sale of animal for breeding purposes, Ann. Cas. 1916A 573.

MERCHANTS NATIONAL BANK OF MASSILLON, OHIO
v. NEES, ET AL.

[No. 8,758. Filed November 2, 1915. Rehearing denied June 2, 1916.]

1. COURTS.—*Record*.—*Nunc Pro Tunc Entries*.—*When Made*.—As a general rule a *nunc pro tunc* entry can be made only where there is some memorial or other minute of the transaction in the case from which what actually took place in the prior proceeding can be clearly ascertained or known; and parol evidence alone is not sufficient to authorize a *nunc pro tunc* entry or to change a record after the proceedings have ceased to be *in fieri*, and after the term at which the record was made. p. 296.
2. APPEAL.—*Review*.—*Briefs*.—*Specifications of Error*.—The court is warranted in refusing to consider instructions where the criticism to the giving or refusing to give such instructions is very general and by abstract propositions of law. p. 296.
3. TRIAL.—*Instructions*.—*How Construed*.—In determining whether there was error in the giving or refusing to give instructions, the instructions given must be considered as a whole. p. 296.
4. APPEAL.—*Briefs*.—*Specifications of Error*.—Where appellant's brief, in its points and authorities, fails to direct any proposition to the overruling of the motion in arrest of judgment and the same is not otherwise discussed, no question as to the alleged error is presented to the court for its consideration. p. 297.

Merchants Nat. Bank v. Nees—62 Ind. App. 290.

5. **WITNESSES.—Cross-Examination.—Discretion of Court.**—Where in an action on notes, it was disclosed by the evidence that there were two sets of notes involved in the transaction, one set having been retired by the issuance of new notes, the court refused to permit a witness, on cross-examination, to answer, after having testified that there had been no accrued interest charged on the old notes at the time the new notes were executed, whether "the interest was thrown off in consideration of the execution of the new notes," such ruling was not erroneous, as the scope of a cross-examination is largely within the discretion of the trial court, and for the further reason that the testimony of the witness substantially covered the information sought to be elicited by the question. p. 297.
6. **NEW TRIAL.—Motion for.—Grounds.—Misconduct of Judge.**—The conduct of the trial judge in expressing to one of the jurors his approval of the verdict of the jury can not be presented to the appellate court in a motion for a new trial, as the alleged misconduct does not come within the rule specifying what causes an alleged error may be included in such motion, for it is only error that can be rectified by the granting of the motion for a new trial that can be assigned as causes therefor. p. 298.
7. **APPEAL.—Necessity of Objections.—Waiver of.—Presence of Judge.—Conduct of Trial.**—While the better practice requires the visible presence of a presiding judge at all times during the actual progress of the trial, yet the fact that the judge absented himself temporarily from the court room on business connected with the trial on two occasions during the argument to the jury is not available error where there were no objections made at the time either to his absence or to argument of counsel and where the record fails to show that such absence was in any way prejudicial to the complaining party, as it is the rule in this state that misconduct of any one connected with the trial not affecting the jurisdiction of the court when acquiesced in without objection is waived. p. 298.
8. **SALES.—Warranties.—Implied Warranty.—Answer.—Sufficiency of.**—A paragraph of answer, based upon a breach of the warranty, which avers, in substance, that the vendor, the manufacturer, sold the vendee a traction engine and a number of wagons, and that it knew the purpose for which the outfit was intended to be used and that it was worthless for such purpose, states a defense sufficient as against demurrer, as, although the negotiations for the sale, which were oral except as to the purchase notes given, did not go to the reasonable fitness of the outfit for the purpose for which it was purchased, the law implies such a warranty, and, the outfit being entirely worthless, there was a failure of consideration by reason of the breach of such implied warranty. p. 300.
9. **FRAUD.—Representations Constituting.—Expressions of Opinion.**—As a general proposition, a representation to be fraudulent in law must be made concerning a material fact, upon which the party to whom it is made has a right to, and does, rely and it must be one

that misleads him to his injury; but mere expression of opinion, concerning the value, utility, future use and the like of property, do not in law constitute actionable fraud, though they be false. p. 303.

10. **FRAUD.**—*Representations Constituting.*—*Professions of Knowledge.*—*When Fraudulent.*—Where a party professing to have knowledge falsely represents a thing to exist and makes the representation for the purpose of procuring an undue advantage over a person, with whom he is contracting and who is without knowledge and relies thereon, he is guilty of fraud, although it may not appear that he knew his statements were false. p. 304.

11. **SALES.**—*Fraud.*—*Sufficiency of Answer.*—*Expressions of Opinion.*—*When not Fraudulent.*—In an action on notes, an answer of fraud that a manufacturer sold the defendants a traction engine and six wagons of his own make, knowing that the outfit was to be used in hauling gravel and that its utility and worth for such purpose was unknown to the defendants; that the vendor represented to them that the engine and wagons could be used, at a great saving, in the form of a train in hauling gravel; that the defendants believed such representations and, after an inspection, purchased the outfit; that the engine was unable to draw the wagons, and that the agents of the vendor were unable to operate the outfit so that it would perform the work for which it was purchased, whereupon the vendor informed the defendants that it would make for them a lighter wagon of smaller capacity and that the engine would draw eight of such wagons loaded with gravel, and, relying upon such representations, defendants agreed to exchange the six original wagons for the eight lighter wagons; that at the time the exchange was agreed upon vendees were furnished blue print of the specifications of the new wagons, which they knew nothing about, but relied on the representations made to them; that new notes were executed and the old notes given for the purchase of the first outfit were surrendered; that when the new wagons were delivered, the defendants attempted to operate the same but could not; that the wagons were insufficient in strength, would not haul the amount of gravel as represented, and that the dumping appliance on the wagons would not work; that the representations made by the vendor as to the outfit being a success were in reckless disregard as to whether the representations were true or false and were made for the purpose of selling the outfit to the defendants; that the engines and wagons were worthless, and that the notes in suit were executed in consideration therefor, *held*, that such answer was insufficient as a plea of fraud, as the representations were mere expressions of opinion. p. 305.

12. **PLEADING.**—*Answer of Failure of Consideration.*—*Sufficiency of.*—Where, in an action on notes, the cause was tried below and briefed on appeal on the theory of fraud, and the answer attempting to interpose the defense of fraud is held insufficient therefor, it is not

made good as a plea of failure or want of consideration by the bare, general allegation therein that the outfit for which the notes were executed was worthless. pp. 306, 311.

13. *APPEAL.—Overruling Demurrer.—When Harmless.*—Where, in an action on notes the execution of which was admitted, the defendants pleaded two paragraphs of answer, one based on a breach of the warranty and the other based on fraud, the latter being held insufficient, and there was a verdict for the defendants, the overruling of the demurrer to the bad paragraph of answer can not be regarded as harmless, as there was nothing to show on which paragraph of answer the verdict of the jury was based. p. 306.
14. *BILLS AND NOTES.—Defenses.—Extension of Time.—Effect of.*—Where the maker of a promissory note agrees with the payee that if the latter will extend the time of payment for a definite time the same will then be paid, and the time is so extended, such promise constitutes a new, enforceable contract, though the maker may have had a good defense to such note before the agreement to extend was made. p. 307.
15. *SALES.—Defects.—Discovery.—Ordinary Diligence.*—Where a number of wagons to be used in hauling gravel were sold to defendants, who, for some time, attempted to use them for that purpose and thereby became acquainted with their lack of adaptability to the character of work to be performed, and the wagons were then exchanged for new wagons differing from those originally purchased only in that they were lighter and of smaller capacity and, for some time prior to the execution of the notes for the purchase price involved the defendants had the new wagons in their possession, with opportunity to make a test of the same that would have disclosed the infirmities complained of, they were bound, under such circumstances, to exercise ordinary diligence to discover such defects as may have existed therein. p. 308.
16. *SALES.—Fraud.—Representations.—Matters of Fact or Matters of Opinion.*—While it is the general rule that statements of a vendor as to the value, utility, and future use of the property he is selling may be put to, are mere matters of opinion; yet where the vendor knows that the vendee is wholly ignorant of the value or utility of the property to be sold and that he is relying on the vendor's representations as to value or utility, and such representations are not made as a mere expression of opinion but as a statement of fact, which statement the vendor knows to be untrue, such statement is a representation by which the vendor is bound. p. 309.
17. *SALES.—Defenses.—Issues Raised by Answer.*—While it is the law that where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be used for a particular purpose, and the buyer necessarily trusts the judgment of the manufacturer or dealer, there is an implied warranty that the article is reasonably fit for the purpose for which it is to be used, yet this rule can have no application to a question

of a vendor's fraudulent representations raised by an answer drafted on the theory of fraud. p. 310.

18. *APPEAL.—Rehearing.—Scope.*—Where appellant's brief in the original appeal did not contend that an answer held not good as a plea of fraud was sufficient as an answer of failure of consideration, such question can not be presented for the first time in the petition for a rehearing. p. 310.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by the Merchants National Bank of Massillon, Ohio, against William J. Nees and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

James V. Kent and *Thomas M. Ryan*, for appellant.

Sheridan & Gruber, for appellees.

Appealed from the Clinton Circuit Court.

MORAN, J.—This was an action by appellant to enforce the collection of eight promissory notes, aggregating \$3,865, against appellees, executed by them to The Russell & Company, a corporation of Massillon, Ohio, and held by appellant by indorsement. The defense interposed to the collection of the notes was predicated upon two affirmative paragraphs of answer addressed to the complaint, which consisted of eight paragraphs, each being based upon one of said notes respectively. It is admitted by both paragraphs of answer that the notes are due and unpaid, and were executed by appellees, but that they were executed in consideration of the sale and delivery to appellees by The Russell & Company of a certain device, consisting of a traction engine and eight wagons, which were intended to constitute a train for the purpose of hauling gravel in the construction of gravel roads. One of said paragraphs proceeds upon the theory of a breach of warranty and the other upon fraud in the sale of the above

described property. Upon issue being joined, a trial was had by a jury, which returned a verdict in favor of appellees, together with answers to certain interrogatories. There was judgment upon the verdict that appellant take nothing by its complaint and that appellees recover costs. From this judgment an appeal has been taken. Errors relied upon for reversal are: Overruling the demurrer of appellant to each paragraph of answer; overruling appellant's motions in arrest of judgment and for a new trial.

Appellees assert that many of the errors relied upon by appellant are not properly presented and are therefore obviated under the rules of appellate procedure. As to such, we shall direct our attention at this time.

It is insisted by appellees that no error can be predicated upon the giving or refusing to give instructions for the reason that the record fails to show that the instructions were filed and exceptions properly reserved thereto. The state of the record as originally filed in this court, and at the time appellee filed his brief, would preclude an examination of the instructions for the reasons above assigned. Since that time, however, Cause No. 9273 of this court has been consolidated with this cause, which brings before us a *nunc pro tunc* entry showing the filing of the instructions and the reserving of the proper exceptions to the same. To the granting of the *nunc pro tunc* entry appellees in this cause duly excepted, and present for consideration the question as to whether the memorandum made on the bench docket by the trial court originally in reference to instructing the jury was sufficient upon which to grant appellant's application for a *nunc pro tunc* entry.

It may be stated as a general rule that a *nunc pro tunc* entry can be made only where there is

some memorial or other minute of the transaction in the case from which what actually

1. took place in the prior proceeding can be clearly ascertained or known; and parol evidence alone is not sufficient to authorize a *nunc pro tunc* entry or to change a record after the proceeding has ceased to be *in fieri*, and after the term at which the record was made. *Williams v. Henderson* (1883), 90 Ind. 577; *Schoonover v. Reed* (1879), 65 Ind. 313; *Boyd v. Schott* (1898), 152 Ind. 161, 52 N. E. 752.

After an examination of the memorandum made by the trial court, and the facts and circumstances offered in evidence throwing light thereon, we are of the opinion, in view of the holdings, that the memorandum made by the trial court authorizing the granting of the application for a *nunc pro tunc* entry was sufficient, and that the instructions must be regarded as properly filed and exceptions duly reserved. The criticism offered as to the

2. giving and refusing to give instructions is very general and by abstract propositions of law, except as to instructions Nos. 11 and 12, given by the court of its own motion; and while we would be warranted in considering only instructions Nos. 11 and 12, as aforesaid, we have, however, examined each instruction given and those requested to be given and refused, in connection with our examination of the objections raised to instructions Nos. 11 and 12, and are fully convinced that when all the instructions given to the jury are considered as a whole, which they must be, there was no reversible

3. error in the giving of either instruction No. 11 or 12, nor in refusing to give either of the instructions tendered by appellant. *Baltimore, etc., R. Co. v. Trustees Tunnelton Lodge, etc.* (1911), 50 Ind. App. 220, 98 N. E. 141; *Indianapolis, etc.,*

Transit Co. v. Reeder (1912), 51 Ind. App. 533, 100 N. E. 101.

Appellant in its brief, under "Points and Authorities," has directed no proposition to the overruling of the motion in arrest of judgment,

4. nor is the same otherwise discussed. Hence the alleged error is not before us for consideration. *Buffkin v. State* (1914), 182 Ind. 204, 106 N. E. 362; *Nashville, etc., R. Co. v. Johnson* (1915), 60 Ind. App. 416, 106 N. E. 414; *Smith v. Finney* (1914), 56 Ind. App. 707, 104 N. E. 887; *Michael v. State* (1912), 178 Ind. 676, 99 N. E. 788; *Anderson v. State* (1913), 179 Ind. 590, 101 N. E. 84.

In its motion for a new trial many causes are assigned by appellant upon the admission and rejection of evidence. However, the only error to which a proposition is addressed under "Points and Authorities" is that the court refused appellant permission to have the witness William S. Nees answer the following question on cross-examination: "The interest was thrown off in consideration of the execution of the new notes, is that right?" There were two sets of notes involved in the transaction. The first set of notes were taken up by the execution of what was known as the new notes. Just preceding the above question, the witness Nees did answer

that, when the new notes were executed and

5. the old ones taken up, the company did not charge appellee with the interest that had accrued on the old notes. This in substance covered appellant's inquiry. The extent to which a cross-examination may be carried is largely within the discretion of the trial court. No error was committed in sustaining the objection to the question thus propounded. *Shields v. State* (1897), 149 Ind. 395, 49 N. E. 351; *Davis v. Coblens* (1899), 174 U. S. 719, 19 Sup. Ct. 832, 43 L. Ed. 1147; *Ledford v. Led-*

ford (1884), 95 Ind. 283; *Citizens Street R. Co. v. Heath* (1902), 29 Ind. App. 395, 62 N. E. 107.

Appellant criticizes the trial court for expressing his opinion to one of the jurors, after the return of the verdict, that a correct result had been reached. It is the duty—much less a commendable quality—of a trial court to keep himself in such a frame of mind that he can pass upon all matters that come before him, or are likely to come before him, in an unbiased manner. This matter is sought to be presented as a cause for a new trial, although it occurred after the return of the verdict by the jury. As to what questions may be presented by the motion for a new trial, it may be stated as a general rule, that “if the ruling is connected with the trial procedure, and is not made upon the pleadings, or not made upon independent questions not relating to the trial, or is not made upon the verdict, or upon answers of the jury to interrogatories, or does not affect the form of the judgment or decree, it should be specified as a cause or reason for a new trial.” Elliott’s App. Proc. §350. The conduct of the

trial judge complained of by appellant does
6. not come within the general rule as a cause for a new trial. It is only errors that can be rectified by the granting of the motion for a new trial that can be assigned as causes therefor.

It is contended by appellant that the trial judge was guilty of misconduct in leaving the court room during the argument of counsel. As to this

7 irregularity, if it may be termed such, the bill of exceptions discloses that after the evidence had been submitted and counsel for appellees was making an argument to the jury, the presiding judge voluntarily absented himself on one occasion for five minutes and on another for ten minutes, for the purpose of dictating instructions to the court re-

porter, who occupied a room that was separated by two doors from the court room where the trial was being conducted and where he could not hear or see what was going on in the court room proper. The bill of exceptions further discloses that there were no objections made or exceptions taken on behalf of counsel for appellant at the time.

There are authorities to the effect that the judge is such an essential part of the court that his absence for any length of time, without suspending the trial, will vitiate the proceedings, whether objections be made at the time or not; on the other hand, there are jurisdictions, of which this state is among the number, which hold that misconduct of anyone connected with the trial not affecting the jurisdiction of the court when acquiesced in without objection is waived, even though it be of such character that might otherwise vitiate the verdict; however, acts of misconduct on the part of the trial judge or anyone connected with the trial might be of such a nature as the policy of the law would forbid any inquiry as to whether harm resulted or not. The following authorities are instructive as to the above propositions. *Starr v. United States* (1903), 4 Ind. T. 550, 76 S. W. 105; *Thompson v. People* (1893), 144 Ill. 378, 32 N. E. 968; *Meredeth v. People* (1877), 84 Ill. 479; *Horne v. Rogers* (1900), 110 Ga. 362, 35 S. E. 715, 49 L. R. A. 176; *Ellerbe v. State* (1897), 75 Miss. 522, 22 So. 950, 41 L. R. A. 569; *O'Brien v. People* (1892), 17 Colo. 561, 31 Pac. 230; *State of Iowa v. Hammer* (1902), 116 Iowa, 284, 89 N. W. 1083; *Waterman v. State* (1888), 116 Ind. 51, 18 N. E. 63; *Kruse v. St. Louis, etc., R. Co.* (1911), 97 Ark. 137, 133 S. W. 841; *State of Iowa v. Carnagy* (1898), 106 Iowa 483, 76 N. W. 805; *Henning v. State* (1886), 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; *Coleman v. State* (1887), 111

Ind. 563, 13 N. E. 100; *Danes v. Pearson* (1893), 6 Ind. App. 465, 33 N. E. 976.

Appellant permitted the act on the part of the presiding judge to be repeated without objection, and his absence was nothing more than momentary, and then for the performance of services connected with the trial. In his absence, there does not appear from the record to have been any objections made on the part of appellant to any remarks that were made by appellees' counsel in his argument, nor is there anything to show that the absence of the trial judge was in any manner prejudicial to appellant. No doubt a word to the bailiff that the trial judge's presence was desired would have brought him back to the bench immediately. The better practice requires the visible presence of a presiding judge; that he be within hearing distance at all times during the actual progress of the trial, but the facts disclosed by the record in this case show no available error on account of the misconduct of the presiding judge in this particular.

This leaves for consideration the sufficiency of the answers, which are very voluminous and it would unnecessarily incumber the opinion to set the same out in full. We will refer to the parts thereof that are important to a discussion of the law applicable to the ruling on the demurrer. The paragraph of answer based upon a breach of warranty discloses that at the time The Russell & Company sold to appellees the engine and wagons

8. it was engaged in manufacturing outfits of this character; that its agent, who sold the outfit to appellees, knew that they were under contract to build numerous gravel roads, where the same were to be built, the character of the highways over which the engine and wagons were to be operated, as well as the gravel pits from where the gravel was

to be procured; and that appellees were without any knowledge of the outfit, except the information obtained from the agent of the company. It is further disclosed that appellees attempted to use the outfit as directed, but that it could not be used for the purpose for which it was purchased; that the engine could not draw the wagons when loaded, and the wagons could not be dumped and would clog; that the outfit was worthless and the company was so notified, and that it was at their disposal, and that the notes executed therefor would not be paid. The negotiations and sale, so far as this paragraph of answer is concerned, were oral, except the consideration that passed, which was the notes in suit, and, in its final analysis, the answer shows no more than a detailed description of the outfit, how it could be used, and that the company manufactured the same and were familiar with the purpose for which it was sold and that it was worthless. The negotiations did not go to the reasonable fitness of the outfit for the purpose for which it was purchased, and this quality not being included within the provisions expressed in the transaction, the same were implied by the law, as the law is a silent factor and enters into every contract. What is implied in an express contract is as much a part of it as what is expressed. *Hudson Canal Co. v. Pennsylvania Coal Co.* (1868), 8 Wall. 276, 19 L. Ed. 349; *Jordan v. Indianapolis Water Co.* (1902), 159 Ind. 337, 64 N. E. 680.

The legal proposition that when the expressed terms of a contract, relating to the purchase of machinery manufactured by the seller, do not relate to obligations created by an implied warranty, the same is not excluded, is fully covered by the *Penn, etc., Glass Co. v. De LaVergne Mach. Co.* (1914),

58 Ind. App. 333, 106 N. E. 722, where the authorities are collected and carefully analyzed.

In the light of the authorities, there was an implied warranty that the outfit purchased by appellees was fit for the purpose for which it was purchased, and being entirely worthless, there was a failure of consideration by reason of the breach of implied warranty. This paragraph of answer stated a defense to the complaint and the demurrer was properly overruled.

The paragraph of answer based upon fraud discloses briefly that The Russell & Company of Massillon, Ohio, sold to appellees a traction engine and eight wagons, which they manufactured for the purpose of hauling gravel, in consideration of \$4,365; that appellees knew nothing about the merits of the outfit, which fact the company well knew, and with the idea of defrauding appellees, the company procured their local agent in Hamilton County, Indiana, whom they knew was a close friend of appellees, and upon whom they knew appellees would rely, to represent to them that The Russell & Company manufactured an outfit, consisting of an engine and a series of wagons, which appellees could use in their business to a great financial advantage; that each wagon would hold six cubic yards of gravel, and that the engine would draw eight wagons in the form of a train; appellees believed the representations made and after visiting the factory where they saw the outfit purchased, they had the same delivered to them, and in May, 1910, appellees attempted to use the outfit but could not; that the engine was unable to draw the wagons or any number of them; an effort was made by the company to operate the same, but it could not do so; the company found that it could not be made to do the work for which it was purchased,

thereupon through its local agent, upon whom they knew appellees would rely, they informed appellees that the company would make for them a lighter wagon, which would hold four cubic yards of gravel, and that the engine in their possession could draw eight of such wagons filled with gravel; and relying upon the representations, appellees agreed to exchange the six wagons for the eight lighter wagons, which the company agreed to manufacture for them; at the time of entering into the contract for the exchange of wagons, appellees were furnished a blueprint in reference to the new wagons, which they knew nothing about, but relied upon representations made to them, and new notes were executed and the old notes, which were executed for the first outfit, except a \$500 note which had been paid, were surrendered. The new wagons were delivered in September, 1910, and appellees attempted to operate the same but could not—they were insufficient in strength; they could not haul the amount of gravel represented, nor could the gravel be dumped therefrom by the appliances for that purpose, as represented. The company made an effort to operate the outfit, but failed. The representations made by the company as to the outfit being a success were in reckless disregard as to whether the representations were true or false, and were made for the purpose of selling the outfit to appellees, and that the engine and wagons were worthless and the notes in suit were executed in consideration therefor.

It may be stated as a general proposition that a representation to be fraudulent in law must be made concerning a material fact, upon which

9. the party to whom it is made has a right to, and does, rely, and it must be one that misleads him to his injury; but mere expressions of opinion concerning the value, utility, future use

and the like of property, do not in law constitute actionable fraud, though they be false; but where a party professing to have knowledge falsely represents a thing to exist and makes the repre-

10. sentation for the purpose of procuring an undue advantage over a person, with whom he is contracting and who is without knowledge and relies thereon, he is guilty of fraud, although it may not appear that he knew that his statements were false. *Conant v. National State Bank* (1889), 121 Ind. 323, 22 N. E. 250; *Smith v. Parker* (1897), 148 Ind. 127, 45 N. E. 770; *Frenzel v. Miller* (1871), 37 Ind. 1, 10 Am. Rep. 62; *Hartford Life Ins. Co. v. Hope* (1907), 40 Ind. App. 354, 81 N. E. 595, 1088; *Timmis v. Wade* (1892), 5 Ind. App. 139, 31 N. E. 827; *Hunter v. McLaughlin* (1873), 43 Ind. 38; *Gatling v. Newell* (1857), 9 Ind. 572; *Hedin v. Minneapolis Medical, etc., Institute* (1895), 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. 628.

The gravamen of the charge of fraud in the answer is that the company that manufactured and sold the articles of property to appellees made representations to them with a reckless disregard for the truth, and that appellees were without any knowledge as to the matter under consideration, and relied thereon and were damaged thereby.

In *Conant v. National State Bank*, *supra*, the sellers represented that they were experts in flour mill machinery; that they had a peculiar knowledge in relation to flour mill machinery, and the purchasers were ignorant of such matters, and that the sellers being experts, and with an intent to deceive the purchasers and to take advantage of their want of knowledge, represented that the machinery was adapted to and in all respects sufficient, and had a capacity of one hundred barrels per day, to make three grades of flour economically and

profitably. This was held to be no more than the expression of an opinion and commendation relating entirely to the work the machinery could do in the future and the manner in which it would do the same.

The property for which the notes in suit were executed it will be remembered was not the property first purchased from The Russell & Company, but property received in exchange therefor. The new wagons contracted to be constructed were similar in mechanism to the wagons first purchased, and which were in appellee's possession, together with the engine, which was to make up a part of the new outfit, from May, 1910, to September of the same year. So as to the engine that was to make up a part of the new outfit appellees were not strangers, and as to the new wagons that were to take the place of the old ones they were not entirely without knowledge. The new wagons at the time of entering into the contract were not in existence; the company agreed to construct them for appellees in accordance with a blueprint, which was placed in their hands at the time of entering into the agreement to construct the same, and to take back the first wagons and surrender the notes executed therefor. Without extending the discussion further

the representations made, as alleged, were

11. not about an existing fact, but were about what the wagons would do when constructed and operated as directed, which falls within the class of representations that is termed by the law as the expression of an opinion; and the allegations of the answer are not such as to take the case out of the general rule that statements of matters of opinion in the nature of predictions cannot, although untrue, constitute a fraudulent representation. *Conant*

v. *National State Bank*, *supra*; *Frenzel v. Miller*, *supra*; *Kimball v. Bangs* (1887), 144 Mass. 321, 11 N. E. 113; *Hunter v. McLaughlin*, *supra*; *Williamson v. Holt* (1908), 147 N. C. 515, 61 S. E. 384, 17 L. R. A. (N. S.) 240; *Elliott on Contracts* §84.

So far as the answer is concerned, the cause was tried below and briefed in this court on the theory of fraud, and it is not good as such. It con-

12. tains the general allegation, however, that the outfit for which the notes were executed, was worthless, and we have examined the same on the theory as to whether it is good as a pleading of a failure of consideration or a want of consideration; and under the holdings it cannot be regarded as good on either of these theories. *Neidefer v. Chastain* (1880), 71 Ind. 363, 36 Am. Rep. 198.

The execution of the notes being admitted, the verdict for appellees cannot be attributed to a failure of proof under the complaint, and there being

13. nothing to show upon which paragraph of answer the verdict of the jury and the judgment of the court rests, the overruling of the demurrer to a bad paragraph of answer cannot, under the circumstances, be regarded as harmless. *Shirk v. Neible* (1900), 156 Ind. 66, 59 N. E. 281, 83 Am. St. 150.

Cause No. 9273, in which a *nunc pro tunc* entry was granted in the court below and consolidated with this cause is affirmed. This cause, being No. 8758, is reversed, with instructions to the lower court to sustain the demurrer to the paragraph of answer charging fraud, and for further proceedings in accordance with this opinion.

ON PETITION FOR REHEARING.

MORAN, J.—It is contended by appellees in their petition for a rehearing that the court was in error in holding (1) that the fourth paragraph of appellees's answer was insufficient to state a defense to appellant's complaint; (2) in reversing the judgment even in the event the fourth paragraph of appellee's answer was insufficient.

The paragraph of answer under consideration is quite lengthy, and in addition to the brief statement of the same in the original opinion it is disclosed, among other things, that after the six wagons and engine were tried, it was found that the outfit could not be made to do the work for which it was purchased, and thereupon the wagons were returned to appellant company, and eight lighter wagons built for and delivered to appellees, which, together with the engine retained by appellees, made up the new outfit. After the new wagons were in appellees' possession for almost a month, the original notes were surrendered to appellees, except a \$500 note which had been paid, and in the execution of the notes in suit, in lieu of the original notes, the payment of the consideration was extended, and appellees relieved from the payment of interest, which had been accumulating for several months. "Where the maker of a promissory note agrees with the payee that if the latter will extend the time

14. of payment for a definite time he will pay the same at the expiration of said period, and the time is so extended such promise of the maker constitutes a new contract, binding in law and capable of enforcement, though the maker may have had a good defense to such note before the agreement to extend was made." *McCormick, etc., Co. v. Yoeman* (1900), 26 Ind. App. 415, 59 N. E. 1069.

It is clear under the circumstances that no fraud could be predicated on the original agreement that brought about the sale of the wagons and the execution of the notes therefor; and if the consideration for the execution of the notes in suit is based upon the extension of time of the payment of the consideration for the first wagons and foregoing the accumulated interest, then a further inquiry is unnecessary, but aside from this, the fourth paragraph of answer is not good. The original wagons were in appellees' possession for over four months, during which time appellees attempted to operate

15. the same in their business, and during such time they thoroughly familiarized themselves with the infirmities thereof, as the answer specifically sets forth, wherein the original wagons failed to perform the work for which they were purchased, and their lack of adaptability to the character of the work to be performed. All this information, it is disclosed by the pleading, was obtained by appellees in attempting to operate the original wagons and in observing the agent of the company attempting to do so, and before contracting for the new wagons. The new wagons were similar to the original wagons, differing only in that they were lighter; and before executing the notes in question appellees, as we have seen, had the wagons in their possession, and had an opportunity to test the same, and the infirmity complained of is such that a test would have disclosed the same. Under such circumstances, a person is bound to exercise ordinary diligence. *Frenzel v. Miller* (1871) 37 Ind. 1, 10 Am. Rep. 62; *Furnas v. Friday* (1885), 102 Ind. 129, 1 N. E. 296; *Anderson Foundry, etc., Works v. Meyers* (1896), 15 Ind. App. 385, 44 N. E. 193.

It is contended by appellees that the statements made by the agent of the company as to the char-

acter of the work the wagons would do when built were more than the expression of an opinion. There are exceptions to the general rule that statements of a vendor as to the value, utility, and future use of the property he is selling may be put to, are mere matters of opinion, for instance, "where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor's) representation as to value, and such representation is not a mere expression of opinion but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound." *Murray v. Tolman* (1896), 162 Ill. 417, 44 N. E. 748.

Judge Campbell in the case of *Picard v. McCormick* (1862), 11 Mich. 68, says: "Where a purchaser, without negligence, has been induced by the arts of a cheating seller to rely upon material statements which are knowingly false, * * * it can make no difference in what respect he has been deceived, if the deceit was material and relied on." The facts that gave rise to this general statement were where a jeweler made false statements to an unskilled purchaser of the value of articles, which none but an expert could be supposed to understand. The facts pleaded in the paragraph of answer under consideration, as we have seen, do not come within the rule announced in the foregoing decisions.

Appellees cite *MacClamrock v. Flint* (1885), 101 Ind. 278; *Fitzmaurice v. Puterbaugh* (1896), 17 Ind. App. 318, 45 N. E. 624; *Oil Well Supply Co. v. Priddy* (1907), 41 Ind. App. 200, 83 N. E. 623; *Oil Well Supply Co. v. Watson* (1907), 168 Ind. 603, 80 N. E. 157, 15 L. R. A. (N. S.), 868, in support of the proposition that where a manufacturer or dealer contracts to supply an article which he manufactures or

produces, or in which he deals, to be used for a particular purpose, and the buyer necessarily trusts the judgment of the manufacturer or dealer, there

17. is an implied warranty that the article is reasonably fit for the purpose for which it is to be used. This principle of law is well settled and may be invoked, where an issue is tendered raising the question of an implied warranty, as was held in the original opinion, but is not applicable to the paragraph of answer here under consideration, which is drafted on the theory of fraud.

Appellees cite *Hoffa v. Hoffman* (1870), 33 Ind. 172, and decisions announcing like principles of law. In this case, it was said, "The false and fraudulent representations as to the capacity of the woolen factory, as to what it had done, and the amount of custom thereto in the past, were matters about which the plaintiff was held in good faith not to misrepresent." This was a statement made concerning a material fact—what the factory had done in the past, and the extent of its customers. This decision furnishes no support to appellees.

In *Conant v. National State Bank*, *supra*, it was said: "The representations of the sellers of the machinery were as to what the machinery would do in the future, and such representations are deemed expressions of opinion, unless facts are averred which give them a different effect. The statements of the seller were not representations of what had been done in the past, but were assertions of what could be done in the future."

Appellees for the first time now insist that the pleading under consideration, if not good as

18. a plea of fraud, is sufficient as an answer of failure of consideration. This does not present any question for a rehearing, not having been presented for consideration at the original hearing. *Ewbanks Manual* (2d ed.) §242.

However, the original opinion discloses that while the question was not presented originally, yet an examination was made along this line for the purpose of affirming the judgment, if possible, and the conclusion reached was that the pleading was not good as an answer of failure or want of consideration. It was said by Elliott J. in *Neidefer v. Chastain, supra*: "The bare general allegation that an article was worthless, thrown into a plea attempting to set up the defense of fraud, can not make good a plea which without it would be bad. The material, substantive facts pleaded are those upon which the validity of the plea must depend; its sufficiency can not be made to depend upon a sweeping concluding statement that the article was wholly without value. If this were the rule, then every plea attempting the defense of fraud could be made good by adding the general allegation that the article was valueless. * * * To permit this would be to permit sweeping and vague assertions to control specific statements of traversable facts."

The answer was drafted solely upon the theory of fraud; it was so treated by the court throughout the trial. The court addressed eight instructions to the issue of fraud as joined upon this paragraph of answer, whereby the jury's attention was called specifically to the principles of law involved in such issue. There was no other issue joined under which the evidence of fraud could have been admitted, nor to which the instructions on the subject of fraud were applicable. In other words, an issue of fraud was tried, when such issue was not properly charged.

The petition for a rehearing is overruled.

NOTE.—Reported in 110 N. E. 73, 112 N. E. 904. See under (1) 11 Cyc 764; (5) 40 Cyc 2511, 2514; (7) 3 C. J. 807, 38 Cyc 1297; (8) 35 Cyc 401; notes, 22 L. R. A. 189; 15 L. R. A. (N. S.) 855. Parol extension of the time for payment of a note, validity, Ann. Cas. 1914A 103.

SWIFT & COMPANY v. MILLER.

[No. 9,055. Filed June 6, 1916.]

1. **PLEADING.—Demurrer.—Memoranda.—Sufficiency of.**—A memorandum accompanying a demurrer, as required by §344 Burns 1914, Acts 1911 p. 145, when designated as “argument” is subject to criticism, yet it is sufficient if it substantially meets the requirements of the statute. p. 316.
2. **PLEADING.—Complaint.—Sufficiency of.**—“Thereupon”.—A complaint alleging that, after the bank had refused payment of checks involved in the action, the plaintiff “thereupon notified the endorser” is sufficient as against a demurrer raising a question as to whether proper diligence had been exercised in notifying the endorser, as the word “thereupon” signifies immediately or at once. p. 317.
3. **PRINCIPAL AND AGENT.—Authority of Agent.—Scope.**—The authority of an agent to sell goods and collect therefor does not confer upon him implied authority to bind his principal by a separate, original and independent contract of endorsement, as such authority is implied only when it is necessary to complete the purpose and scope of the expressed power of the agency. p. 319.
4. **PRINCIPAL AND AGENT.—Authority of Agent.—Limitations.—Endorsement of Negotiable Instruments.**—Where an agent, with authority to sell goods, collect and remit therefor, was furnished by his principal with a stamp with which customers’ checks were to be endorsed in buying exchange payable to the principal, the wording of the stamp, “Pay to or order for exchange, payable to Swift & Company. Swift & Company, By” indicated very clearly that the stamp was to be used solely in endorsing customers’ checks for the purpose of buying exchange payable to Swift & Company, and there could be inferred from the agent’s possession of the stamp and the language impressed thereon no authority for the agent to endorse his personal checks even to secure exchange payable to his principal, especially since such use of the stamp was not necessary to the complete exercise of the agent’s power. p. 322.
5. **PRINCIPAL AND AGENT.—Authority of Agent.—Limitations.—Endorsement of Negotiable Instruments.—Burden of Proof.**—Where an endorsement stamp, provided by the principal, has such wording upon it as to indicate a limitation of its use to the endorsement, by the agent possessing it, of customers’ checks payable to the principal, such stamp is sufficient to put others on inquiry as to the extent of the agent’s authority to endorse checks therewith, and where one relies on the authority of the agent to endorse his personal checks with the endorsement stamp, the burden is on him to show such authority in the agent. p. 323.
6. **BILLS AND NOTES.—Bank Check.—Presentment.—Time.**—Under §9089a2 Burns 1914, Acts 1913 p. 132, providing that an instrument payable on demand, such as a bank check, must be presented

within a reasonable time after its issue, such reasonable time for presentment, under ordinary conditions, when the holder resides at the place where the check is made payable, includes all of the banking hours of the day immediately following the day on which the check is received. p. 325.

7. **BILLS AND NOTES.—Bank Check.—Presentment.—Time.**—Where the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and be presented not later than the day immediately following the day of its receipt at the place of payment. p. 326.
8. **BILLS AND NOTES.—Bank Check.—Presentment.—Time.**—As between the holder and drawer of a check delay in presentment will not ordinarily discharge the drawer from liability, but if loss results from the delay for which the drawer is not responsible, the delay is at the peril of the holder. p. 326.
9. **BILLS AND NOTES.—Bank Check.—Presentment.—Time.—Delayed Notice of Dishonor.—Discharge of Endorser.**—As between the holder of a check and an endorser, unreasonable delay in presentment for payment, or in giving notice of dishonor, will discharge the endorser from his liability without regard to whether such delay did or did not occasion loss to the holder. p. 326.
10. **BILLS AND NOTES.—Presentment for Payment.—Delay.—Answer.—Sufficiency.**—Under §9089s2 Burns 1914, Acts 1913 p. 132, which provides that an instrument payable on demand must be presented for payment within a reasonable time, in an action against the endorser to enforce collection of checks, an answer was filed interposing the defense that there had been a delay of several days in presenting for payment the checks involved and that such delay was unreasonable. *Held*, that such delay was unreasonable and that it was error to sustain a demurrer to such answer. p. 330.
11. **BILLS AND NOTES.—Bank Checks.—Notice of Dishonor.—Sufficiency of Notice to Agent of Endorser.**—Where one employs an agent to sell goods, and to collect and remit therefor, and furnishes such agent an endorsement stamp to be used in endorsing customers' checks to the principal to buy exchange payable to such principal, which limitation of the use of the stamp is indicated by the language impressed thereon, and the agent, without authority, uses the stamp to endorse his principal's name on his personal checks, which were subsequently dishonored by the bank, and suit is brought against the principal, as endorser, to enforce collection of the checks, a notice of the dishonor of such checks to the agent and his successor is not notice to the principal or to "his agent in that behalf" within the meaning of §9089s3 Burns 1914, Acts 1913 p. 136. p. 331.
12. **BILLS AND NOTES.—Bank Checks.—Notice of Dishonor.—Delay.—Answer.—Sufficiency.—Discharge of Endorser.**—In a suit against an endorser to enforce collection of checks dishonored by the bank, an answer, interposing as a defense that notice of the dishonor of

the checks had not been given the defendant until more than a month thereafter, is good as against demurrer, as such answer shows affirmatively that notice was not given in accordance with the provisions of §9089y3 and §9089z3 Burns 1914, Acts 1913 p. 136, and the defendant was, therefore, discharged from liability as endorser. p. 331.

13. PRINCIPAL AND AGENT.—*Use of Principal's Name for Private Advantage.*—An agent can not take advantage of his position to use his principal's name to his own private advantage. p. 331.

14. PRINCIPAL AND AGENT.—*Authority.—Evidence.—Sufficiency to Sustain Verdict.*—A judgment was obtained by the plaintiff in a suit against an endorser to enforce collection of checks dishonored by the bank, the evidence disclosing that an agent employed to sell goods and remit his collections was furnished by his principal with an endorsement stamp to be used in endorsing his principal's name on customers' checks to buy exchange payable to the principal, the language impressed on the stamp indicating such a limitation of its use, and that the checks involved in the action, which had been endorsed with the principal's endorsement stamp, were the personal checks of the agent. *Held*, that, in the absence of any evidence to show express or implied authority in the agent to endorse his personal checks with his principal's name, the evidence was insufficient to sustain a verdict for the plaintiff. p. 332.

From Knox Circuit Court; *Benjamin M. Wiloughby*, Judge.

Action by George S. Miller against Swift & Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Clarence B. Kessinger and *R. C. McManus*, for appellant. *Harry R. Lewis*, for appellee.

FELT, J.—This suit was brought by appellee, Miller, against appellant, Swift & Company, to recover on two checks drawn by L. N. Elson on the German National Bank of Vincennes, Indiana, payable to the order of Swift & Company and indorsed as follows:

“Pay to Miller Bros. or order for exchange payable to Swift & Company.

Swift & Company by L. N. Elson.”

Appellant's demurrer to the complaint for in-

sufficiency of the facts alleged to state a cause of action was overruled. Appellant answered the complaint in five paragraphs, the first of which was a general denial. A demurrer for insufficiency of facts alleged to state a defense to appellee's cause of action was sustained to each of the amended third and fifth paragraphs of answer. A trial by court resulted in a judgment for appellee for the amount of the checks. Appellant has separately assigned as error the ruling on the demurrer to the complaint and to each amended paragraph of answer aforesaid, and also the overruling of its motion for a new trial.

The facts stated in the complaint are in substance as follows: At and prior to the time the checks sued on were drawn, appellee was engaged in the drug business in the city of Vincennes, Indiana, and was also a subagent for the American Express Company and sometimes did business for the company under the name of "Miller Brothers." One L. N. Elson was employed by Swift & Company to sell its goods in the city of Vincennes and to collect therefor, and he frequently bought orders from appellee for the purpose of remitting to appellant collections made by him in its business. In paying for such orders Elson gave to appellee money and checks. The checks were payable to appellant and were endorsed as follows: "Pay to Miller Bros., or order for exchange payable to Swift & Company (signed) Swift & Company, by L. N. Elson." Among the checks given appellee were those in controversy, one for \$244, dated September 11, 1913, and one for \$552.24, dated October 13, 1913. A copy of each of said checks was filed with and made a part of the complaint. Appellee issued express money orders on the American Express Company payable to appellant for the amount of the checks and paid the company therefor. Thereafter appellee caused said

checks to be presented to the bank on which they were drawn for payment and payment was refused. Thereupon appellee notified appellant of the refusal of the bank to pay the checks. On November 22, appellee again notified appellant in writing by registered mail. Appellee also demanded payment of each of the checks from L. N. Elson and payment was refused. Appellee thereupon notified appellant of the nonpayment of each of said checks, which demand and notice were made and given immediately after the bank had refused payment of each check. By reason of the facts aforesaid appellant is indebted to appellee in the sum of \$796.24, which amount is due and unpaid.

Appellant's memoranda accompanying the demurrer to the complaint is denominated "argument" and is assailed by appellee as insufficient to present any question under the sixth clause of §344 Burns 1914, Acts 1911 p. 415. The memoranda is

1. subject to criticism, but looking to its substance rather than its form, we think it substantially meets the requirements of the statute, notwithstanding the misleading and erroneous appellation given to it. The substance of the memoranda is that the complaint seeks to hold appellant liable as an indorser; that as an indorser it is entitled to all the rights and defenses authorized by the common law and commercial usage as the same have been enacted into the statutes of our State (§9089 *et seq.* Burns 1914, Acts 1913 p. 120 *et seq.*); that the complaint does not show due diligence on the part of appellee when the checks were dishonored, in the giving of notice to appellant; that the complaint does not show that appellant was notified within the time prescribed by the statute. The complaint charges that the checks were duly presented for payment and the bank on which

they were drawn refused payment and that, "He * * * *thereupon* notified the endorser, Swift & Company, * * * of the refusal of said bank to pay said checks and each of them."

2. The word "*thereupon*" signifies that the bank was "immediately, at once, without delay" (Webster's Dictionary) so notified. There was no motion to make the complaint more specific, and as against the demurrer the complaint is not objectionable on the ground alleged and was not insufficient on any ground presented by the memoranda. The court, therefore, did not err in overruling the demurrer thereto.

As already shown, the first paragraph of appellant's answer was a general denial. The second paragraph is drawn on the theory of fraud by appellant's former agent, Elson, and appellee, in the drawing and acceptance of the checks in the manner aforesaid to procure the money from appellant. The third amended paragraph of answer proceeds on the theory that the endorsement of the check for \$244 in the manner aforesaid was unauthorized and that there was unreasonable delay in presenting the checks to the bank for payment. It alleges in substance that as to that part of appellee's complaint which seeks to recover upon the check for \$244 dated September 11, 1913, appellee ought not to recover for the reason that said check was endorsed by appellant to appellee on September 11, 1913; that it was held by appellee for a period of seven days from that date before the same was presented for payment to the bank on which it was drawn; and that this check was signed and endorsed by said L. N. Elson without the authority of appellant. The fourth paragraph of answer in substance alleges that L. N. Elson was the agent of appellant in Vincennes, Indiana, to sell

its products and collect for same; that appellant provided said Elson with a stamp in form as follows:

“Pay to _____ or order for exchange,
payable to Swift & Company.
Swift & Company.
By _____.”

That said stamp was furnished for the sole and only purpose of enabling said Elson to endorse checks of appellant received in payment of its products for exchange payable to appellant; that appellant knew that such was the extent of Elson's authority and that he had no right or authority to endorse his own checks with such stamp, and appellee accepted the checks in suit with full knowledge thereof and with knowledge of the fact that Elson had no funds in the bank, upon which the checks were drawn, out of which the checks could be paid, but accepted the same intending thereby to seek to hold appellant liable for the amount. The amended fifth paragraph of answer alleges in substance that the check for \$244 set forth in appellee's complaint was received by appellee on September 11, 1913, and the check for \$552.24 on October 13, 1913; that both of said checks were drawn by L. N. Elson in manner aforesaid; that without any authority so to do said Elson endorsed said checks in the name of appellant; that each of said checks was drawn upon the German National Bank of Vincennes, Indiana, which bank refused payment of the check for \$244 on September 18, 1913, and of the latter check on October 14, 1913; that appellee knew that Elson endorsed the check in the name of appellant without its consent or authority, and failed to notify appellant, as such alleged endorser, of the dishonor of said checks until November 22, 1913; that appellant did not know prior to the receipt of said notice that said checks had been so drawn and endorsed by said Elson.

Three principal questions are discussed. The first is that of Elson's authority to endorse his own checks by use of the stamp furnished him by appellant and thereby bind appellant as endorser. The second is that of timely notice to appellant as endorser, if it be held to be endorser. The third is that of due and timely presentment of the check for \$244. It is also suggested that appellant is liable as a maker. This contention is not even plausible, for the whole theory of the case is that appellant is liable as an endorser. On the theory of the complaint and the facts of the case, appellant is not liable at all unless liable as endorser of the checks sued upon. *Pattilo v. Alexander* (1895), 29 L. R. A. 616, 621; *Jaffray v. Krauss* (1894), 79 Hun. (N. Y.) 449. There is no claim that Elson as agent had any express authority to so endorse his own check, and the question turns upon the implied authority that may be inferred from his power to sell appellant's goods and collect therefor and the fact that he was furnished with the aforesaid stamp by appellant.

The authority of an agent to sell goods and

3. collect therefor does not confer on him implied authority to bind his principal by theseparate, original and independent contract of endorsement. This proposition of law has been applied in this State in the case where the agent authorized to sell and collect received a check payable to his principal for the goods sold, and without any authority other than his power to sell goods and collect therefor, endorsed the check by writing on the back thereof the name of his principal and thereby received in person the amount of the check. *Hamilton National Bank v. Nye* (1905), 37 Ind. App. 464, 467, 77 N. E. 295, 117 Am. St. 333; *Runyan v. Snell* (1888), 116 Ind. 164, 167, 18 N. E. 522, 9 Am. St. 839; *Blackwell v. Ketcham* (1876), 53 Ind. 184, 186; *Robinson v. Anderson* (1886), 106 Ind. 152, 155,

6 N. E. 12; *Knowlton v. School City, etc.* (1881), 75 Ind. 103, 107; *Stainback v. Bank, etc.* (1854), 11 Va. (Grattan), 269; *Myers v. Walker Bros. Co.* (1897), 104 Ga. 316, 30 S. E. 842; *Pluto Powder Co. v. Cuba, etc., Bank* (1913), 153 Wis. 324, 329, 141 N. W. 220; *Wallace v. Bank* (1840), 1 Ala. 565, 571; *German National Bank v. Studley* (1876), 1 Mo. App. 260, 264; 1 Daniel, Neg. Inst. §290.

Tiedeman on Commercial Paper, §77, is in part as follows: "We have this general rule that applies to all cases of implied agencies, that no authority will be implied from an express authority, unless it is positively needful for the performance of the main duties contemplated by the express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers, will be conceded to the agent by implication. In order, therefore, that the authority to make or draw, accept and endorse, commercial paper as the agent of another may be implied from some other express authority, it must be shown to be strictly necessary to the complete execution of the express power. And the execution and negotiation of commercial paper are considered by the commercial world so liable to infliction of injury on the principals, if this authority is given to agents—the general custom being to reserve this power for personal exercise,—that the presumption of the law is more strongly opposed to an implied authority to execute and negotiate commercial paper than to do anything else. Hence, in this connection, the rule is strictly enforced, that the authority to execute and endorse bills and notes as agent will not be implied from an express authority to transact some other business, unless it is absolutely necessary to the exercise of the express authority." The rule above announced was approved in *Hamilton National Bank v. Nye, supra*, and is well supported by authority.

In Daniel on Negotiable Instruments, *supra*, it is said: "The authority to bind the principal in a certain character on a negotiable instrument can not be construed as an authority to make the principal a party in any other character. Thus authority to draw a bill is not of itself authority to endorse one, nor to accept one; nor does authority to endorse imply authority to accept a bill; nor to make a several or joint note. So it has been considered that authority to draw a bill upon the principal does not imply authority to the agent to draw in his own name; and that the principal would not be estopped from refusing payment by having paid previously a bill so drawn." In *Stainback v. Bank, etc., supra*, it was held that: "A power of attorney to draw, endorse or accept bills, and to make and endorse notes, negotiable at a particular bank, in the name of the principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate individual business of the principal: And an endorsement of a bill by the agent in the name of his principal, for the benefit of the agent, is beyond his authority, and does not bind the principal." In *Myers v. Walker Bros. Co., supra*, the Supreme Court of Georgia says: "It is well settled that a mere general power to endorse promissory notes does not confer upon the agent authority to make an endorsement for the accommodation of third persons." In *Pluto Powder Co. v. Cuba, etc., Bank, supra*, the Supreme Court of Wisconsin considered a case where the agent had power to sell and collect, and had general control of his principal's business, with authority to employ help, in a certain locality. In passing upon the question of such agent's authority to endorse a check made payable to his principal, the court, among other things, said:

"We think the great weight of authority is to the effect that upon the undisputed evidence in this case Robinson had no authority, express or implied, to sign the name of plaintiff to negotiable paper. In the instant case the defendant cashed the checks drawn payable to plaintiff upon the unauthorized signature by Robinson of the name of plaintiff. * * * The bank therefore became liable to the plaintiff, the funds having been misappropriated by Robinson. * * * Since no express authority was given Robinson to endorse or sign negotiable paper on behalf of plaintiff, such power must be shown to be necessary to the exercise of the power conferred, and the burden was upon the defendant to show implied authority. * * * Third persons having notice that they are dealing with an agent are bound to inform themselves of the extent and limitations of his authority. * * * The mere fact that Robinson had authority to receive negotiable paper in payment for goods sold carried with it no power to endorse it."

From the foregoing it is clear that Elson had no authority to endorse his own checks, payable to appellant, in the manner shown, unless such authority under the rules of law applicable thereto, can be inferred from the possession of the aforesaid stamp and the language impressed upon it, viz.:

"Pay to _____ or order for exchange,
payable to Swift & Company.

Swift & Company.

By _____."

The language used imposed a very clear limitation upon the use of the stamp. It indicated that obligations payable to Swift & Company might be

4. endorsed by using the stamp, but only for the purpose of securing "exchange payable to Swift & Company." Such stamp in the hands of

appellant's agent having authority to sell, collect and remit, can not reasonably be construed as implying authority to endorse the agent's personal check made payable to his principal, even though exchange be procured by the use of such check. Such use of the stamp by the agent was not necessary to the proper and complete exercise of the

power actually conferred upon Elson as appellant's agent. The limitations of authority shown by the stamp itself were sufficient notice to appellee to put him upon inquiry as to the extent of such agent's authority and any reasonable inquiry of appellant would have revealed the lack of authority on the part of Elson to make such use of the stamp. In this situation the burden was on appellee to show the requisite authority and there is nothing shown beyond the facts already indicated. *Bright Nat. Bank v. Hartman* (1916), 61 Ind. App. 440, 109 N. E. 846; *Wagner v. McCool* (1912), 52 Ind. App. 124, 134, 100 N. E. 395. The principle involved here was applied in *Runyan v. Snell* (1888), 116 Ind. 164, 18 N. E. 522, 9 Am. St. 839, where Mitchell, J. (p. 167) said: "There is no presumption that an agent, with authority to sell and accept payment for his principal, is authorized to receive in payment notes of which he is the maker, nor can he be presumed to have authority to accept the notes of third persons in payment of purchase-money due to his principal." Appellant's agent had no authority to use the stamp to make appellant his accommodation endorser, or to use it in any way except for the purpose of endorsing checks or obligations payable to appellant from customers or other third parties to enable him to procure exchange and remit to his principal.

While the third and fifth paragraphs of amended answer contain averments of lack of authority of the agent to endorse the checks in suit, such aver-

ments seem to be only incidental to the main tenor of such pleadings. The third paragraph purports to be a partial answer only showing undue delay in presenting the check for payment. The fifth paragraph of amended answer counts upon the fact that appellant did not receive due and timely notice to bind it as an endorser of the checks sued upon. Section 9089k3 Burns 1914, Acts 1913 pp. 120, 135, provides that: "When a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each endorser, and any drawer or endorser to whom such notice is not given is discharged." The Uniform Negotiable Instruments Act, §9089y3, *supra*, Acts 1913 p. 136, further provides as follows: "Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times: 1. If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following. 2. If given at his residence, it must be given before the usual hours of rest on the following day." Section 9089z3, *supra*, provides that: "Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: 1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor or if there be no mail at a convenient hour on that day, by mail the next thereafter. 2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last sub-division."

Section 9089s3, *supra*, provides that: "Notice of dishonor may be given either to the party himself or to his agent in that behalf." Section 9089c7, *supra*,

Acts 1913 p. 149, provides that: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." Section 9089s2, *supra*, Acts 1913 p. 132, provides that: "Where it (the instrument) is *payable on demand*, presentment must be made within a reasonable time after its issue, except that in the case of a *bill of exchange*, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof." Section 9089r2, *supra*, "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument. * * * But except as herein otherwise provided, *presentment* for payment is necessary to charge the drawer and endorsers."

The gist of the third paragraph of amended answer is that appellant as endorser of the check for \$244 is not liable thereon because appellee held the same for seven days before presenting it to the bank on which it was drawn for payment. Appellee resided in the city of Vincennes in which city the bank was located. The Uniform Negotiable Instruments Act (§9089n7 Burns 1914, Acts 1913 p. 150) provides that: "In any case not provided for in this act the rules of the law merchant shall govern." The statute §9089s2, *supra*, provides that an instrument payable on demand must be presented

6. within a reasonable time after its issue. Under the rules of the law merchant, a check must be presented within reasonable time after it is received. Under ordinary conditions when the holder resides at the place the check is made payable, such reasonable time for presentment includes all of the banking hours of the day immediately following the day on which the check is received. If

the bank upon which the check is drawn is at another place the check must be forwarded to

7. the place of payment on the next business day, and be presented not later than the day immediately following the day of its receipt at the place of payment. Crawford, Negotiable Instrument Law §186, p. 248; *DeHoust v. Lewis* (1908), 128 App. Div. 131, 132, 112 N. Y. Supp. 559; Wood's Byles, Bills and Notes (8th ed.) 19 *et seq.*, 5 Cyc 531 *et seq.* As between the holder and the drawer of a check delay in presentment will not ordinarily discharge the drawer from liability, but if loss results from the delay for which the drawer is not responsible, the delay is at the
9. peril of the holder. As between the holder of a check and an endorser, unreasonable delay in presentment for payment, or in giving notice of dishonor, will discharge the endorser from his liability without regard to whether such delay did or did not occasion loss to the holder. *Gordon v. Levine* (1907), 194 Mass. 418, 421, 80 N. E. 505, 10 L. R. A. (N. S.), 1153, 120 Am. St. 565, 10 Ann. Cas. 241; *First Nat. Bank v. Currie* (1907), 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.), 698, 701, 118, Am. St. 537, 13 L. R. A. 43; *LaFollette Coal, etc., Co. v. Whiting Foundry, etc., Co.* (1900), 25 Ind. App. 647, 649, 57 N. E. 255 and cases cited; *Carroll v. Sweet* (1891), 128 N. Y. 19, 22, 37 N. E. 763, 13 L. R. A. 43; *Aebi v. Bank, etc.* (1905), 124 Wis. 73, 78, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. 925; *Dehoust v. Lewis, supra*, p. 132; *Commercial Nat. Bank v. Zimmerman* (1906), 185 N. Y. 210, 218, 77 N. E. 1020; *Little v. Phenix Bank* (1842), 2 Hill (N. Y.) 425; *Dolon v. Davidson*, 16 Misc. Rep. 316, 318, 39 N. Y. Supp. 394; *Murray v. Judah* (1826), 6 Cowen (N. Y.) 484, 490; *First Nat. Bank v. Miller* (1893), 37 Neb. 500, 55 N. W. 1064, 40 Am. St. 499,

503; *Stevens v. Park* (1874), 73 Ill. 387, 388; *Smith v. Janes* (1838), 20 Wend. (N. Y.) 192, 32 Am. Dec. 527; 2 Randolph, Commercial Paper §1106; 2 Daniel, Neg. Inst. §§1586, 1601; 5 Cyc 532 and cases cited; Tiedeman, Commercial Paper §442.

Joyce on Defenses to Commercial Paper, §585, says: "An endorser of a check is not liable where presentment is not made in a reasonable time. Where the payee of a check becomes chargeable as an endorser only, such check must be presented for payment within a reasonable time. * * * In order to charge an endorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes into his possession. Where such reasonable time is not fixed by statute, then, in the absence of special circumstances of excuse, it is limited to the next business day, or if the bank upon which the check is drawn is at another place the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment." In 3 R. C. L., §446, p. 1224, it is said: "The distinguishing feature of the liability of an endorser of any negotiable paper is that such liability is contingent upon due presentment for payment and notice of dishonor. The rule is based upon the implied undertaking of the indorsee that he will use due diligence in the prosecution of his demand against the maker; that he will present the paper for payment immediately upon its maturity, and will not, by his negligence, expose the endorser to a hazard of loss, against which he, in case of notice of dishonor, might be able otherwise to protect himself. Without such notice the endorser would have a right to conclude either that the note was paid or that

the holder was satisfied to look alone to the maker for payment. Nor are the rights of the endorser changed because he suffered no apparent damage by reason of failure to demand payment and give notice of dishonor to him within the required time. If the holder failed to perform this duty to give timely notice of non-payment, the law presumes injury to the endorser, and discharges him. Neither justice nor convenience will admit of an inquiry, whether actual damage was sustained. It was formerly held that it was incumbent on the person insisting on the want of notice, or other omission, to prove that he had really sustained damage by laches of the holder; but it has been settled by later decisions that such damage is to be presumed." In *Gordon v. Levine*, *supra*, the Supreme Court of Massachusetts said: "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case.' This, however, would not seem to lay down or establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which has been established is, that where the drawer and drawee and the payee are all in the same city or town, a check, to be presented within reasonable time, should be presented at some time before the close of banking hours on the day after it is issued, and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid

afterwards the drawer suffers no harm. But if not presented and paid within the time thus fixed, and there is a loss it falls not on him but on the holder." In *Carroll v. Sweet*, *supra*, the New York Court of Appeals, in considering the liability of an endorser of a check, said: "The plaintiff on accepting the check assumed, as between himself and the defendant, an obligation to present the same to the bank for payment within the time prescribed by the law merchant, that is to say, not later than the next day after its date, and if refused, to protest the same and give notice of non-payment. (*Smith v. Janes*, 20 Wend. 192). It was not presented until the thirty-first of August, nine days after it was received by the plaintiff. The defendant was, by such delay, discharged from liability as endorser of the check, irrespective of any question of loss or injury. Presentment in due time, as fixed by the law merchant, was a condition upon performance of which the liability of the defendant as endorser depended, and this delay was not excused although the drawer of the check had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment (*Mohawk Bank v. Broderick*, 10 Wend. 304; *Gough v. Staats*, 13 id. 549). A different rule obtains as between the holder and drawer of a check. As between them presentment may be made at any time and delay in presentment does not discharge the liability of the drawer unless loss has resulted."

In *First National Bank v. Currie*, *supra*, the Supreme Court of Michigan said: "The undertaking of the endorser of a check is that, if not paid on presentation within a reasonable time, he will pay it, provided he is properly notified. Such reasonable time for presentation and demand for payment is admit-

ted to be within the day following the endorsement. The endorsee, as between himself and the endorser, undertakes to demand payment within the day following the endorsement, and, if payment is not made, to give due notice of dishonor. This is his sole duty, and he does anything else at his peril. 2 Daniel, Neg. Inst. (5th ed.) §1601; *People, ex rel. Port Chester Sav. Bank v. Cromwell*, 102 N. Y. 477, 4 N. E. 413. The fact that there are no funds in the account against which the check is drawn does not relieve the holder from presentation and notice of dishonor to the endorser, unless it appears that the endorser knew it. 2 Daniel, Neg. Inst. §1596; 1 Morse, Banks and Banking (4th ed.) §262 subd. 8. Nor are the rights of the endorser changed because he suffered no apparent damage by reason of failure to demand payment and give notice of dishonor to him within the required time. *Mohawk Bank v. Broderick*, 13 Wend. (N. Y.) 133." Following the statute and in harmony with the authority above indicated, we hold that a delay of

seven days in presenting the check for \$244
10. for payment was unreasonable, and that the court erred in sustaining the demurrer to the amended third paragraph of answer.

The gist of the amended fifth paragraph of answer is that there was unreasonable delay in notifying appellant of the dishonor of both of the checks sued upon. The answer avers that appellant was not notified until November 22, after the dishonor of the checks on September 18 and October 14, 1913, respectively. The statute fixes the time for such notice. §§9089y3, 9089z3, *supra*. Appellee seems to rely on notice given to Elson and appellant's agent who succeeded him. We do not regard this argument as pertinent to the question of the sufficiency of the fifth paragraph of answer, further than the implied admission that the notice, on November

22, was too late to bind appellant as endorser.

While under the statute notice of dishonor

11. may be given to the principal or, to "his agent in that behalf," we hold that on the facts of this case, neither Elson nor the agent who succeeded him, was the agent of appellant" in that behalf. Under the law applicable to the case the delay in giving appellant notice

12. as alleged discharged it from liability as endorser without regard to the question of damage caused by such delay. The court therefore erred in sustaining the demurrer to the amended fifth paragraph of answer. In this case our decision is strengthened by the principle that an

13. agent can not take advantage of his position to use his principal's name to his own private advantage. Furthermore the use of appellant's name in the manner indicated in endorsing the agent's personal check was sufficient notice to those accepting such checks that the agent was exceeding his authority, or at least it was sufficient to put such persons upon inquiry to ascertain the extent of his authority. *Claflin v. Bank* (1862), 25 N. Y. 293; *Allen v. South Boston R. Co.* (1889), 150 Mass. 200, 205, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. 185. In *Claflin v. Bank, supra*, the court in substance said: No officer of the bank was authorized to certify a check when there were no funds of the drawer to meet it.

* * * Nor can any officer or agent of the bank certify his own checks; *for no one acting in a fiduciary capacity as trustee or agent can employ his position for his own private benefit*, and where the name of the officer who certifies the check is the same as the drawer, that circumstance is sufficient to charge all persons dealing with the check that they are the same person, and

if such be truly the case, and the check were improperly certified, no holder could recover. Under the alleged error in overruling appellant's motion for a new trial the question is presented as to the sufficiency of the evidence to sustain the judgment. We have already indicated that Elson as agent had neither express nor implied authority to use appellant's name to endorse his own checks, and that the stamp furnished him did not give him apparent authority so to do, but it clearly indicated a restriction or limitation of his authority in that behalf. 7 Cyc 806-807 and cases cited. *Williams v. Potter* (1880), 72 Ind. 354.

There is therefore a total failure of evidence to show the agent's authority to endorse the checks sued upon or to give him apparent authority

14. to endorse his own checks in the name of his principal. The motion for a new trial should therefore have been sustained upon the ground that the decision is not sustained by sufficient evidence and also on the ground that it is contrary to law. Our Uniform Negotiable Instruments Act is substantially like those of many other states where such statutes have been in force for many years. Most of the cases cited are from states having such statutes and the decisions deal with questions involving the statute. The judgment is therefore reversed, with instructions to overrule the demurrers to each of the amended third and fifth paragraphs of answer, to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 113 N. E. 447. See under (3), (4) 2 C. J. 636; 31 Cyc 1373, 1385; (8) 8 C. J. 545; 7 Cyc 979; (11) 8 C. J. 653; 7 Cyc 977. Delay in presentment of check, release of endorser, 22 L. R. A. 785; 10 Ann. Cas. 1121; 10 L. R. A. (N. S.) 1153.

PATTERSON ET AL. v. TOWN OF FORT BRANCH ET AL.

[No. 9,445. Filed June 7, 1916.]

1. **MUNICIPAL CORPORATIONS.—Annexation of Territory.—Appeal from Finding of Board of County Commissioners.**—While §§8899b, 8899c Burns 1914, Acts 1909 p. 450, governing the annexation by towns of territory contiguous thereto, does not provide for an appeal from the finding of the board of county commissioners, yet, an appeal not having been specifically denied by that statute, the general statutes, §§6021-6023 Burns 1914, §§5772-5774 R. S. 1881, relating to such appeals, applies, since, in the absence of such denial, it is to be presumed that the legislature intended that the general statutes authorizing such appeals from such boards should govern. p. 335.
2. **APPEAL.—Review.—Decisions of Intermediate Courts.—Defective Transcript.**—In a proceeding to annex land to a town, an appeal from the finding of the board of county commissioners was taken by the petitioners, who filed an appeal bond with the county auditor who failed to properly certify a transcript of the proceedings with the clerk of the circuit court, but, in the court below, where defects in the transcript might have been urged on motion of either party, there was no objection made to its insufficiency and a trial was had on the merits of the cause with the full appearance of all the parties. *Held*, that, under the facts in the case, the failure of the auditor to properly certify the transcript is not ground for reversal, especially as there had been no objection made to the form of the transcript until an appeal was taken to the appellate court. p. 336.
3. **APPEAL.—Appeal Bond.—Execution.—Presumption.**—An appeal will not be dismissed because the bond, which was approved by the county auditor, was signed by the town attorney instead of the town trustees, where the bond was considered properly executed by all the parties and the objection urged is presented for the first time in appellant's brief, as, under the facts in the case, it will be presumed that the town officers did their duty and complied with the provisions of the law authorizing appeals and for the further reason that, if the bond was irregularly executed, the matter should have been presented in the trial court where any defect might have been corrected by filing a new bond in accordance with §1354 Burns 1914, §1283 R. S. 1881. p. 337.

From Gibson Circuit Court; *Simon L. Vandever*, Judge.

Action by the Town of Fort Branch and others to annex contiguous territory. Opposed by William

Patterson and another. From a finding of the board of county commissioners denying annexation, the petitioners appeal to the circuit court, and, from a judgment there granting annexation, the contestants appeal. *Affirmed.*

Claude A. Smith and *Oscar Lanphar*, for appellants.

Harvey Harmon, for appellees.

IBACH, J.—Appellees, proceeding under the provisions of a statute passed by the legislature in 1909, §§8899b, 8899c, Burns 1914, Acts 1909 p.450, petitioned the board of commissioners of Gibson county to annex contiguous unplatted territory to the town of Fort Branch. Appellants appeared before the commissioners and opposed the annexation of the territory described in the petition and in the plat of the territory which was made a part of such petition. Evidence was heard and a finding made that the lands should not be annexed. Within thirty days thereafter, appellees filed their appeal bond with the county auditor and appealed to the Gibson Circuit Court. In the circuit court appellants filed their motion to dismiss the appeal, which motion was overruled. A trial resulted in a finding and judgment that the territory involved should be annexed.

The errors assigned arise on the overruling by the circuit court of appellant's motion to dismiss the appeal from the county commissioners' court, and on the sufficiency of the evidence to support the judgment of the Gibson Circuit Court. The sufficiency of the petition is not questioned, but it is first contended that the right of appeal is purely statutory; that the annexation of contiguous unplatted territory to a town is a special proceeding under the statute heretofore mentioned, which does not pro-

vide for an appeal, and therefore there is no appeal from the action of the board of commissioners to the circuit court as was allowed in this case. The evident purpose of the statute was to enable municipalities such as appellee town to annex contiguous territory. Provision was made therein for a hearing on a petition filed for that purpose by boards of commissioners and, while the act itself does not provide for an appeal

1. from the action of such boards, we are of the opinion that the general statutes which give the right to appeals, §§6021, 6022, 6023, Burns 1914, §§5772, 5773, 5774 R. S. 1881 apply to the case at bar. If it had been the intention of the legislature to deny the right of appeal in such instances, the act itself would have so provided, and in the absence of such a provision it is to be presumed that the legislature intended that the statutes, *supra*, relating to appeals from such boards, should apply and that an appeal might be taken by either party to such proceedings. The following cases support this construction: *Paul v. Town of Walkerton* (1898), 150 Ind. 565, 571, 50 N. E. 725; *Forsythe v. City of Hammond* (1895), 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; *Grusenmeyer v. City of Logansport* (1881), 76 Ind. 549, 557

It was also urged in the motion to dismiss the appeal, and it is again urged here, that what purported to be a transcript of the record from the commissioners' court was not certified to by the county auditor, and for that reason the appeal should have been dismissed; also, that in order for a town to appeal, some steps must first be taken by the trustees authorizing an appeal, and in this case no such action was taken by them and the bond in this case was not signed by such trustees in behalf of the town, but by the town attorney.

As to the first of these contentions, we are unable to find anywhere in the record that any objection was ever made to the insufficiency of the transcript either in the motion to dismiss the appeal, or

2. at the trial of the cause in the circuit court; but the record does disclose the fact that there was a full appearance in the circuit court by all appellants. If this objection had been urged in the court below, the transcript could have been corrected on motion of either party.

The record further discloses that the appellee town filed an appeal bond, as the statute requires, with the auditor of the county, which was by him approved. It then became his duty to prepare a proper transcript of the proceedings before the county commissioners and to certify the same to the clerk of the circuit court of the county and deliver the appeal bond to him as well. Such bond need not be copied in or made a part of the transcript, but a delivery of the same to the clerk will be a sufficient compliance with the statute in that particular. It is also our opinion that the facts of this case are sufficient to warrant the conclusion that the failure of the auditor to properly certify the transcript to the clerk of the circuit court is not a sufficient ground to warrant a reversal of the cause. The failure of the auditor to do his duty will not in all cases be chargeable against the appellees, and will not in all cases affect the jurisdiction of this court. Especially is this true where it is made to appear that the cause was adjudicated by the trial court after a full appearance of the parties and a trial had on the merits and no objection made to the form of the transcript until an appeal has been taken to this court. *Board, etc. v. Loeb* (1879), 68 Ind. 29; *Strebin v. Lavengood* (1904), 163 Ind. 478, 485, 487, 71 N. E. 494.

What has been said with reference to the transcript will also apply to the objection here urged that the appeal bond was signed by the town

3. attorney instead of the town trustees, and without direct authority from them. The bond was approved by the county auditor, was considered properly executed by the parties, and the objection now urged against it is urged for the first time in the brief of appellant. It is to be presumed that the officers of appellee town did their duty and complied with the provision of the law authorizing appeals in such cases, and, if the bond in this case was irregularly executed, it was the duty of appellants to present that matter to the trial court. No presumptions will be indulged against the validity of the bond and since the bond in this case was approved by the county auditor and filed with the county clerk it will be held to have been sufficient for the purposes of this appeal, and if any defect therein was shown, such defect could have been remedied when the case reached the circuit court by filing a new bond. §1354 Burns 1914, §1283 R. S. 1881; *Bennett v. Seibert* (1894), 10 Ind. App. 369, 37 N. E. 1071.

Appellants introduced no evidence at the trial. The trial court found that the evidence presented by appellee was sufficient to support the petition, and we believe there is some evidence in the record to support that conclusion. We find no error in the record necessitating a reversal of the cause. Judgment affirmed.

NOTE.—Reported in 113 N. E. 319. See under (2) 4 C. J. 504; 3 Cyc. 148; (3) 2 Cyc. 837, 850.

GLADIEUX V. JOHNS ET AL.

[No. 9,505. Filed June 7, 1916.]

1. **APPEAL.—Parties.—Dismissal of Appeal.**—Where the holder of a mechanic's lien obtained judgment in the lower court on a cross-complaint in an action for partition, but was not made a party to the appeal by the assignment of errors in appellant's brief, the appeal will be dismissed, as the appellate court has no power to disturb a judgment unless all in whose favor it was rendered are parties to the appeal. p. 341.
2. **APPEAL.—Appellate Jurisdiction.—Objections to.—When not Waived.**—Appellees did not waive the question as to jurisdiction by filing a motion for time in which to file their brief where the court's record shows that the motion to dismiss was filed before the petition for time and such petition sets out that all motions to dismiss have already been filed. p. 341.
3. **APPEAL.—Dismissal by Court on Own Motion.**—The appellate court will dismiss a cause on its own motion where the parties necessary to a complete determination of the action are not brought into court. p. 342.

From Allen Superior Court; *Carl Yaple*, Judge.

Action by Louis L. Gladieux against Irma Johns and others, in which certain defendants file cross-complaints. From a judgment determining the rights of the several parties in the property involved in the action, plaintiff appeals. *Appeal dismissed.*

William C. Ryan, for appellant.

Leonard, Rose & Zollars, for appellees.

McNUTT, J.—This was an action brought by appellant against appellees Johns and Johns for the partition of real estate. Appellant filed an amended complaint to which he made other parties defendants, including the New Haven Supply Company, alleging that they each, except Joseph J. Johns, had or claimed some lien on the real estate, and asked that his title be quieted as to all defendants, and for partition and the establishment of the priorities of the liens. Some of the defendants filed disclaimers, and all the others except Joseph J. Johns, hus-

band of Irma Johns, filed answers and cross-complaints, including defendant New Haven Supply Company.

The cross-complaint of Irma Johns was against appellant and her codefendants, and by it she asked to recover certain rents from appellant, who was her cotenant, and to quiet title against all codefendants, including the New Haven Supply Company.

Appellee Girardot filed a cross-complaint against appellant and Irma Johns and her husband, setting up a written lease on the real estate executed by appellant and acquiesced in by Mrs. Johns. The New Haven Supply Company filed a cross-complaint against appellant and all its codefendants, setting up a mechanic's lien against said real estate, and asking for its foreclosure. Subsequently, on motion of Mrs. Johns, the New Haven State Bank was made a defendant and it filed a cross-complaint against appellant and its codefendants, setting up a mortgage on the real estate and asking that said mortgage be declared a lien and paid out of the proceeds of sale. The issues were closed by a general denial to all the cross-complaints. The cause was submitted to the court, and the court found that appellant and Mrs. Johns were the owners of the real estate described in the amended complaint, as tenants in common; that the said bank held a mortgage, which was a first lien after payment of costs; that the New Haven Supply Company held a mechanic's lien which was next to be paid; that appellant paid some liens on the real estate, and that his cotenant, Mrs. Johns, owed him a certain sum, which was next to be paid out of her part; that appellant had kept possession of the real estate adverse to his cotenant, Mrs. Johns, and that he owed her a certain sum for rents, which was a lien on appellant's part of the real

estate; that appellant had given a written lease to cross-complainant Girardot, which was void "as between the parties to this proceeding"; that certain attorneys be paid out of the funds; that the property be sold by commissioners. The judgment of the court followed the above findings, to which appellant and said Girardot separately excepted, and each filed separate motions for a new trial, which were overruled, and exceptions reserved.

Appellant has undertaken to perfect a term time appeal, and assigns as error: (1) That the court erred in making new parties over objection of appellant after submission of the cause, and after a portion of the evidence was heard; (2) that the court erred in overruling appellant's motion for a new trial. Appellant's motion for a new trial is for the following causes: First, that the court erred in permitting new parties defendant made parties to this action after cause was submitted for trial, and a portion of the evidence heard. Said action of the court in making new parties being over the objection of the plaintiff, and to the ruling of the court permitting such parties to be made defendants at said time the plaintiff then and there excepted. Second, that the decision of the court is contrary to law. Third, that the decision of the court is not sustained by sufficient evidence.

In appellant's assignment of errors, he makes Joseph J. Johns, Irma Johns, the New Haven State Bank and said Girardot appellees. Appellees Johns and Johns, on May 5, 1916, before their time for filing brief expired, appeared specially for the purpose, and filed a motion in this court to dismiss the appeal because the New Haven Supply Company was not made an appellee. On the same day said appellees filed their petition for extension of time to file their brief, which was granted. Appellant,

by his motion for a new trial, the overruling of which he assigns as error, challenges generally the judgment of the court as being contrary to law and not being sustained by sufficient evidence, and this includes that part of the judgment in favor of the New Haven Supply Company. In the case of *Lauster v. Meyers* (1908), 170 Ind. 548, 84 N. E. 1087, the Supreme Court said: "The assignment of errors is the complaint in this court, and only the parties adverse to appellants in the judgment appealed from, over whom jurisdiction is acquired, are those named therein as appellees. If such adverse parties to the appeal are not made appellees in this court, the case can not be determined upon its merits, because this court has no power to disturb the judgment without disturbing it as to all in whose favor it was rendered, and this court has no jurisdiction to disturb it as to those who are not parties to the appeal." (Citing numerous authorities.) See also *Cline v. Beaver* (1915), 183 Ind. 296, 108 N. E. 231, 232; *Deinhart v. Mugg* (1911), 176 Ind. 531, 532, 96 N. E. 467; *Garside v. Wolf* (1893), 135 Ind. 42, 34 N. E. 810. Under said authorities, this court has no jurisdiction to disturb the judgment rendered in favor of the New Haven

1. Supply Company, as it is shown that said company has not been made a party to the appeal by the assignment of errors, and the appeal, therefore, must be dismissed.

Appellant contends that appellees, by filing their petition for time to file their brief, thereby appeared to the action, and waived all questions as to

2. jurisdiction. The notation by the clerk of this court on the transcript of the filing of the motion to dismiss, and the petition for an extension of time in which to file brief, shows that the motion to dismiss was filed before the petition for time, and

the petition for time sets out that all motions to dismiss had already been filed. Under these facts we hold that said appellees have not waived the question urged in their motion to dismiss, even if this were a case where such question could be waived by them. But this court will dismiss a cause on

its own motion where the parties necessary
3. to a complete determination of the action are not brought into court. *Abshire v. Williamson* (1897), 149 Ind. 248, 252, 48 N. E. 1027, 1028. The facts in the above case were similar to the facts in this case, and therein the court said: "Not having the power, under the facts, to decide this cause as an entirety, unless all of the necessary parties are brought into court as required by law, therefore we will not violate the well settled rule which forbids the decision of a cause in fragments, by asserting authority to make a partial decision in this case, which must be regarded as an entire and indivisible cause, but may, and properly should, dismiss the appeal on our own motion." See authorities cited, also Ewbank's Manual §150 and cases cited. Appeal dismissed.

Note.—Reported in 113 N. E. 320. See under (1) 3 C. J. 1035; 2 Cyc 785; (3) 4 C. J. 589; 3 Cyc 182.

WINDLE ET AL. v. CITY OF VALPARAISO ET AL.

[No. 9,002. Filed June 7, 1916.]

1. MUNICIPAL CORPORATIONS.—*Ordinances.—Force of.*—An ordinance passed by the common council of a municipality is regarded and treated as a species of legislation as much as an act passed by the legislature itself. p. 349.
2. MUNICIPAL CORPORATIONS.—*Streets.—Control and Regulation.*—Municipal corporations have the exclusive right to control and regulate the use of streets in cities. p. 350.
3. MUNICIPAL CORPORATIONS.—*Ordinances.—Streets and Alleys.—Judicial Control.*—An ordinance regulating a street is a legislative act, entirely beyond the control of the judicial power of the state,

so long as the exercise of the legislative sovereignty is within the objects and trusts for which the power is conferred. p. 350.

4. MUNICIPAL CORPORATIONS.—*Statutory Powers.—Incidental Powers.*—Municipal corporations possess only such powers as are conferred upon them by legislative enactment, with such other incidental implied powers as are essential to the accomplishment of the purpose for which they were created. p. 350.
5. MUNICIPAL CORPORATIONS.—*Streets and Alleys.—Vacation.—Power.*—Section 8700 Burns 1914, Acts 1905 p. 282 and §8959 Burns 1914, Acts 1913 p. 12, vest in the common council of a municipal corporation the express power to vacate streets and alleys, and the adoption of the resolution in accordance with the statute, after proper notice and hearing as to those affected, is conclusive on all persons. p. 350.
6. MUNICIPAL CORPORATIONS.—*Vacation of Streets and Alleys.—Resolution.—Conclusiveness.—Direct Attack.*—While the statutes (§8700 Burns 1914, Acts 1905 p. 282 and §8959 Burns 1914, Acts 1913 p. 12) concerning the vacation of streets and alleys provide that the adoption, by the common council, of the resolution of vacation, after proper notice and hearing as to those affected, shall be final and conclusive as to all persons, yet such resolution is not final and conclusive as against direct attack, by those aggrieved, in an action to set aside the vacation proceedings, and where injunctive relief is sought it is merely an ancillary remedy. p. 351.
7. MUNICIPAL CORPORATIONS.—*Vacation of Streets and Alleys.—Public or Private Purpose.—Judicial Review.*—In the absence of fraud, there can be no judicial review of an ordinance or resolution vacating an alley, if such action is of public utility; but, if the vacation is for a private purpose, then it is a proper subject for judicial investigation. p. 351.
8. MUNICIPAL CORPORATIONS.—*Vacation of Streets and Alleys.—Receipt of Benefit Assessment by City.—Effect of.—Evidence.*—The fact that a municipality, in a proceeding to vacate an alley, receives a sum of money, paid as a benefit assessment by a vacation petitioner who desired to use the land vacated, is of little weight in determining whether the common council was moved to adopt the vacation resolution by financial considerations, for the acceptance of such money is not an irregularity, since the statutes (§8700 Burns 1914, Acts 1905 pp. 282-286) provide that where benefits accrue to any property owner by reason of the vacation of a street or alley benefits shall be assessed to the property so benefitted. p. 352.
9. MUNICIPAL CORPORATIONS.—*Vacation of Streets and Alleys.—Exercise of Authority of Council.—Motives.*—The vacation of an alley being within the scope of the authority of the common council, and coming within its express grant of power, the court can not make inquiry as to the motives of the council in adopting a vacation resolution. p. 352.

10. MUNICIPAL CORPORATIONS.—*Vacation of Streets and Alleys.—Exceeding of Powers by Council.—Evidence.*—Where the vacation of an alley is of public utility and is found to be such by the common council, then the benefit that flowed to a vacation petitioner by reason of restoring to him the real estate relieved of the public easement therein, in event he paid the benefits assessed, and the purpose for which he intended using the ground vacated are not pertinent where the question to be determined is whether the council exceeded its powers in adopting the vacation resolution. p. 353.
11. MUNICIPAL CORPORATIONS.—*Vacation of Streets and Alleys.—Judicial Inquiry.—Matters Outside Record.*—Where the vacation of a street or alley is within the jurisdiction of a municipality, the court can make no inquiry as to matters outside the record unless the proceedings are infected with fraud. p. 354.
12. EVIDENCE.—*Action of Council.—Presumptions.*—The common council of a municipality is presumed to have acted in good faith and according to law in the performance of its duty in a proceedings to vacate a street or alley. p. 354.
13. FRAUD.—*Constructive Fraud.—Necessity of Intention.*—Fraud may exist, as a matter of law, without any intention to commit a wrong and is known as constructive fraud, and it may consist of any breach of duty, which, if not relieved against, would operate as a fraud. p. 355.
14. FRAUD.—*Actionable Fraud.—Necessity of Injury.*—A grievance based upon fraud, whether actual or constructive, to be actionable must work an injury in some manner to the complaining party. p. 355.
15. MUNICIPAL CORPORATIONS.—*Vacation of Streets and Alleys.—Validity.*—Where a petition of property owners, filed with the common council, asking that an alley be vacated discloses that one of the petitioners desired to have the alley vacated so that he might build a department store thereon and asserted that the employment therein of a large number of people would benefit the city, and the council, after complying with the statutes in reference to such proceedings, adopted a vacation resolution and made an assessment of benefits in the amount of \$1,900 against the property of such petitioner, there is nothing to warrant the conclusion that the alley was vacated for a private purpose, nor that the common council acted beyond its scope of duty and exceeded its discretionary power, nor that its acts amounted to constructive fraud. p. 355.

From Lake Circuit Court; *W. C. McMahan*,
Judge.

Action by William G. Windle and others against

the City of Valparaiso and another. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

Daniel E. Kelly and John H. Gillett, for appellants.

E. D. Crumpacker, Wm. C. Daly, Grant Crumpacker, O. L. Crumpacker and E. J. Freund, for appellee.

MORAN, J.—Appellants on their own behalf, and for all other taxpayers of the city of Valparaiso other than appellee Lowenstine, brought suit against the city and appellee Lowenstine to have a proceeding vacating a portion of a certain alley of the city declared null and void, and to enjoin appellee Lowenstine from using the vacated portion of the alley other than for a public purpose. A review of the action of the trial court in refusing the relief sought, is based upon exceptions reserved to conclusions of law rendered by the court upon facts specially found. Appellees have assigned cross-errors, but the conclusion reached on the merits of the appeal makes it unnecessary to consider the same.

From the facts found by the court, block 22 in the city of Valparaiso, which is a city of the fifth class, is within the principal business district of the city. An alley $16\frac{1}{2}$ feet wide extends from east to west through the center of the block, and a similar alley from north to south, the alleys intersecting in the center of the block, thus subdividing the block into four equal divisions. On June 13, 1913, appellee Jacob Lowenstine and six other citizens of Valparaiso petitioned for the vacation of 132 feet off the west end of the alley running east and west through the block. Omitting the formal parts, the petition reads:

“The undersigned, residents and freeholders of the city of Valparaiso, Indiana, petition the common council of said city for the vacation of

an alley, in said city, running east from Franklin street through the west half of block 22 original survey of the town (now city) of Valparaiso, to the west line of the alley running north and south through said block 22, for the following reasons:

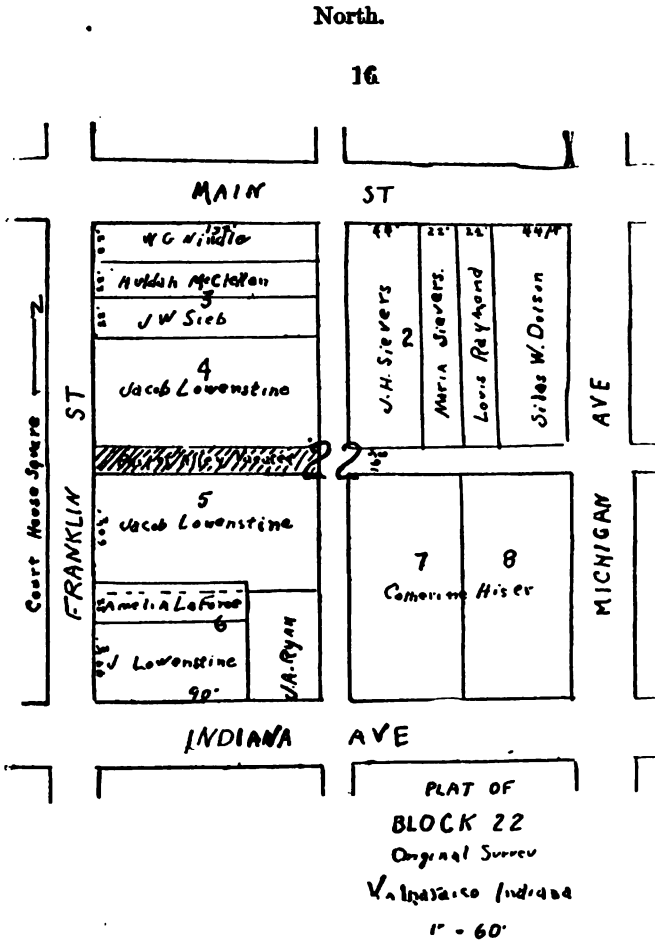
1. The portion of said alley asked to be vacated is not a public utility, and it would promote the public interests, and save the city from responsibilities and the expense of maintaining the alley sought to be vacated.

2. That said alley is seldom used by any one excepting by J. Lowenstine & Sons, and the said J. Lowenstine one of the petitioners hereto, is the owner of lands on both sides of the alley proposed to be vacated, and if said alley shall be vacated he contemplates the enlargement of the department store of J. Lowenstine & Sons to such an extent as will make necessary the employment of twenty or twenty-five additional clerks and assistants and tend to attract more people to the city of Valparaiso for trading purposes.

3. That most of the modern cities of the size of Valparaiso have but one alley running through the block; and that the north and south alley, through said block 22, and the alley from the east side of said north and south alley to Michigan street will answer every convenience of all the property owners in said block.

4. While the question of the vacation of said alley must be determined upon the issue of whether or not it is of general importance, it may be well for the petitioners to suggest to the common council that said J. Lowenstine is and always has been a public spirited man, and has built a large mercantile establishment in said city, and established a steel factory therein, which is now employing twenty-five men at an annual aggregate salary of fifteen thousand dollars, not including the salaries paid to the officers of the concern. For the above reasons the petitioners respectfully ask that the portion of the alley above described be vacated."

A plat of blocks 22, which we here append, furnishes an intelligent understanding of the relation which the portion of the alley in controversy bears to the surroundings.



South.

Block 22 is 280½ feet square; the streets adjoining the block are all improved with modern street paving material, and the alleys, including the portion under consideration, are paved with vitrified brick and have been for several years. The petition praying for the vacation of that portion of the alley under consideration was, over the objection of the remainder of the owners of real estate in block 22, referred by the common council to the street committee consisting of three of its own members, for investigation. On July 11, 1913, the committee reported to the common council that from the investigation it had made, the public interests of the city would be advanced by the vacation thereof; that the city would be relieved from the responsibility of maintaining the same; that the city had little or no interest in keeping the alley open, and further that the committee was advised that appellee Lowenstine, who owned the abutting property and the fee to the portion of the alley sought to be vacated, would erect a large department store in the event the petition was acted upon favorably; that he would be benefited in the sum of \$1,900, and that he should be assessed to this amount in the event the council finally granted the prayer of the petition; that the owners of the remaining real estate in the block would not in any way be injured by the vacation of only that part of the alley upon which appellee Lowenstine's property abutted; that the remaining alleys furnished ample means of egress and ingress to the property owners of the block. After the necessary notices were given and a hearing had as to the parties opposing the vacation proceedings, the city council passed an ordinance vacating the portion of the alley recommended to be vacated by the street committee.

Interspersing the findings, which are voluminous,

are evidentiary facts to the effect that promises were made by appellee Lowenstine that he would build a large department store, in the event the council acted favorably upon the petition, and that the promises, in part at least, moved the council to pass the resolution vacating that part of the alley upon which Lowenstine's property abutted. The legal proposition for solution, when reduced to its simplest form, is: To what extent, if at all, are the proceedings of the common council of the city of Valparaiso in reference to the action it took in vacating the alley under consideration subject to judicial review in a suit in equity? The force and value of an ordinance passed by a municipality from the standpoint of its legal significance has been the subject of much investigation, as is disclosed by the adjudicated cases and text-book writers upon municipal law. While there is some confusion in the authorities upon this question, in the main, an ordinance passed by a common council of a municipality is regarded

1. and treated as a species of legislation as much as an act passed by the legislature of the state itself, though the body that passed it is subordinate in its character and a creature of the legislature. *Crichfield v. Bermudez, etc., Co.* (1898), 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347; *Schmidt v. City of Indianapolis* (1907), 168 Ind. 631, 80 N. E. 632, 14 L. R. A. (N.S.), 787, 120 Am. St. 385; 28 Cyc 290; *Indiana R. Co. v. Calvert* (1906), 168 Ind. 321, 80 N. E. 961, 10 L. R. A. (N.S.), 780, 11 Ann Cas. 635; *Pittsburgh, etc., R. Co. v. Hartford City* (1908), 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L. R. A. (N.S.) 461.

In *Paulsen v. Portland* (1892), 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637, the court said: "The city is a miniature State, the council is its legislature, the charter is its constitution; and it is enough if, in

that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions.”

It is well settled in this State that municipal corporations have “the exclusive right to control

2. and regulate the use of streets in cities. In this respect, it is endowed with legislative sovereignty. The exercise of that sovereign-

3. ty has no limit so long as it is within the objects and trusts for which the power is conferred. An ordinance regulating a street is a legislative act, entirely beyond the control of the judicial power of the State.” *Milhau v. Sharp* (1854), 17 Barb. 435; *Indiana R. Co. v. Calvert*, *supra*; *Pittsburgh, etc., R. Co. v. Hartford City*, *supra*; *Paulsen v. Portland*, *supra*. In this connection,

however, it can further be said that municipal corporations possess only such powers as are conferred upon them by the legislature, with such incidental powers as are implied and essential to the accomplishment of the purpose for which they were created. The grant of express power conferred upon municipal corporations

5. in this state provides that streets and alleys may be vacated by the common council, after notice and hearing as to those affected, and after the final step has been taken by resolution in accordance with the statute it is declared to be conclusive on all persons. §8700 Burns 1914, Acts 1905 p. 282; §8959 Burns 1914, Acts 1913 p. 12.

The subject-matter here under consideration was plainly within the authority expressly granted to the common council of the city of Valparaiso, hence we need not further pursue the question of the power of the council to act in the premises. This leaves for consideration the manner in which it exercised the power thus conferred. As we have seen, the

general subject-matter relating to the vacation of streets and alleys is regarded as legislative in its character. However, as to the actual hearing of those affected by such vacation, as provided by statute, the same is quasi-judicial and, in a case such as here under consideration, where there is no question of jurisdiction, must be ordinarily regarded as final. *Alsmeier v. Adams* (1914), 62 Ind. App. 219, 105 N. E. 1033. For if this function of government is to be exercised, the power must necessarily be lodged somewhere; and it being lodged in the common council, and the council having determined the question that the alley should be vacated, this determination carried with it the finding that it was for the public good, and in the absence of fraud is binding on all persons affected, which is in accordance with the general theory of our practice before tribunals whose duty it becomes to pass upon such question. As we have seen, the statute (§8700, *supra*) under consideration recognizes this

6. principle, as it provides that, after the necessary steps have been taken and a hearing had, the action of the common council shall be final and conclusive; but it need only be said in passing that the ordinance or resolution vacating the alley is not final and conclusive as against a direct attack. The attack in this case is direct, as it specifically challenges the ordinance or resolution asking that it be annulled and set aside; the injunctive relief prayed is but an incident to the main relief sought.

The common council could by ordinance vacate the alley in question in the event that to do so would be a work of public utility. If the vacation

7. was for a private purpose, then the act of vacating is a proper subject for judicial investigation. *Field v. Barling* (1894), 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. 311;

Smith v. McDowell (1893), 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; *Reimer's Appeal* (1882), 100 Pa. 182, 45 Am. Rep. 373; *St. Vincent, etc., Co. v. Troy* (1879), 76 N. Y. 108, 32 Am. Rep. 286; *Dubach v. Hannibal, etc., Co.* (1886), 89 Mo. 483, 1 S. W. 86.

Appellant takes the position that the facts disclose that the alley was vacated for a private purpose; that the council was moved to act in the premises by reason of a promise made by appellee Lowenstine that he would, in the event the alley was vacated, erect a large department store upon the ground occupied by the alley and the adjoining lots, and for the further consideration of the payment of the sum of \$1,900 to the city by appellee Lowenstine as benefits that would enure to him by reason thereof.

The latter contention that the city's reaping of a benefit, in the way of a money consideration to be paid by appellee Lowenstine, was instrumental in moving the council to act is of itself of but little weight. It is not an irregularity in the proceedings, as the statute provides that where benefits accrue to any property owner by reason of the vacation of a street or alley benefits shall be assessed to the property so benefited. §§8700-8709 Burns 1914, Acts 1905 pp. 282-286. The sections of the statute thus referred to relate to powers conferred upon the boards of public works in cities of the first, second, third and fourth classes but, under §8959, *supra*, are made applicable to cities of the fifth class. *Fry v. Seely* (1913), 55 Ind. App. 670, 104 N. E. 774.

The subject-matter in controversy being within the scope of the authority of the common council, and coming within its express grant of power,

9. the court cannot initiate an inquiry into the motive of the legislative department of the city of Valparaiso in this behalf. *Coverdale v.*

Edwards (1900), 155 Ind. 374, 58 N. E. 495; *Lilly v. City of Indianapolis* (1897), 149 Ind. 648, 49 N. E. 887; *City of Indianapolis v. Maag* (1914), 57 Ind. App. 493, 107 N. E. 529; *Richland School Tp. v. Overmyer* (1904), 164 Ind. 382, 73 N. E. 811.

This court held in the *City of Indianapolis v. Maag, supra*, that: "The motives which prompted the action of the board of public works" in vacating the street could not be made the subject of judicial investigation. But the end to be attained by such proceedings and the effect thereof may always be inquired into by the courts upon proper application." In *Richland School Tp. v. Overmyer, supra*, in a proceeding to condemn land for school purposes, it was said: "The fact, if it be true, that the township trustee would be directly or indirectly benefited in his private business, beyond the general benefits resulting to the public from the appropriation, or that he was, to an extent, influenced by bias or prejudice for or against appellee in instituting his proceedings, was not a proper matter to go before the jury, or in any sense pertinent to the real issue for trial." So in the case at bar, if the vacation

of the alley in question was a work of public utility and was found to be such by the common council, then the benefit that flowed to appellee Lowenstine by reason of restoring to him the real estate relieved of the easement the public had therein, in the event he paid the benefits assessed, is not pertinent to the real issue, nor is the purpose for which he was to utilize the ground after being vacated relevant.

In the *City of Gary v. Much* (1913), 180 Ind. 26, 101 N. E. 4, cited by appellants, the city vacated a certain street, which was upon the boundary line of the corporation, and shut out the ingress and egress

of an abutting property owner. The abutting property owner was granted injunctive relief, but the case turned upon the proposition that the city was without jurisdiction to vacate the street, the center of which was the boundary line of the corporation, part of the thoroughfare being under the control of the board of commissioners. That case throws no light upon the question here presented, for in the case at bar the question of want of power or jurisdiction is not involved, but only the question whether the council exceeded its power. Much of the matter embodied in the special finding of facts was brought to the court by evidence extraneous to the record of the vacation proceedings, and as to whether a court of equity can go beyond the face of the record and institute an inquiry into the proceedings, when there is no question presented as to the jurisdiction of the common council to act, the authorities lack much of being in harmony; but out of the vast number of adjudicated cases may be adduced a rule, which seems to be in consonance with the better reasoning, and that is, that

11. where in the absence of fraud the municipality had jurisdiction to act there can be no judicial inquiry by the court, but where the proceedings are infected with fraud the inquiry may proceed beyond the face of the record itself. There is no contention that

12. the common council acted corruptly or intentionally committed a wrong. Further the action taken by the common council has in its favor the presumption that it acted in good faith in the performance of its duty and according to law. *Robling v. Board, etc.* (1895), 141 Ind. 522, 40 N. E. 1079; *Town of Cicero v. Lake Erie, etc., Co.* (1912), 52 Ind. App. 298, 97 N. E. 389.

Fraud, however, may exist without any in-

tention to "do a wrong," as the law itself may, under certain conditions, declare a thing

13. to be fraudulent without a real intention to commit fraud having been found. This is known as constructive fraud, or fraud in law, and may consist of any breach of duty, which, if not relieved against, would operate as a fraud. *Alsmeier v. Adams, supra*; 16 Cyc 87.

A radical departure in the transaction of public business by a public officer from the

14. usual and lawful method of transacting the same, or a palpable disregard of an official duty, might operate as a fraud in law, although there was no intention to do a wrong. But a grievance based upon fraud, whether actual or constructive, to be actionable must work an injury in some manner to the complaining party, as this is an essential ingredient to the cause of action. *Smith, Law of Frauds* 3; 16 Cyc 88.

Do the facts found force the conclusion that the vacation of the alley under the circumstances amounted to a constructive fraud? The closing up of a public way in the heart of the city and turning the same back to the owner of the fee, freed from the public easement, called for due and careful consideration on the part of the common council of the city of Valparaiso, and in this behalf they have supporting their action the presumption of good faith. It is true that the petition filed

15. with the common council and heretofore set out discloses that the appellee Lowenstine was personally interested in having the alley vacated, and that the information that he intended to build a large department store, in the event the alley was vacated, was before the common council when they acted upon the petition; but when the special finding of facts is stripped of the evidentiary

facts thrust into the same, there is not enough to warrant the conclusion that the alley was vacated for a private purpose, nor that the common council acted beyond its scope of duty and exceeded its discretionary power, nor that its acts amounted to constructive fraud. *In Rensselaer v. Leopold* (1886), 106 Ind. 29, 5 N. E. 761, the court held: "It is said, however, that narrowing the street, whereby a strip five and a half feet in width off one side is abandoned to the adjoining property-owners, is not a public use; that this is nothing more than an indirect method of transferring part of the public street to private use. While it is true, courts can not be precluded from an inquiry into the character of the use for which property is proposed to be condemned, yet the presumption is in favor of the public character of a use which is declared to be public by the legislature. Unless it is apparent at first blush that the proposed use is not public, courts cannot interfere with the discretion confined to a municipal body, in doing that which the statute expressly authorizes."

If appellants suffered any special injury it must be inferred from the facts found, as there is no positive finding in this respect. As to whether appellants whose properties do not abut upon that part of the alley vacated had such an interest as taxpayers to maintain the suit, which appellees earnestly contend they did not have, we need not decide, as the conclusion reached on the other branch of the case does not call for a decision of this question. After a careful consideration of the various questions presented by the learned and exhaustive briefs, we find no error that calls for a reversal of the judgment. Judgment affirmed.

NOTE.—Reported in 113 N. E. 429. Power of city council to vacate streets, 26 L. R. A. 823; 2 Ann. Cas. 87. See under (9) (10), (11) 28 Cyc. 840, 849.

WILLIAMS v. LOWE.

[No. 9,054. Filed June 7, 1916.]

1. **APPEAL.—Review.—Assignment of Errors.—Specification of Errors.**—Where appellant's first and second assigned errors set forth that the trial court erred in sustaining appellee's demurrers to the first and second paragraphs of answer "to appellee's complaint" no question is presented the appellate court for review by such assigned errors, because the record does not disclose any ruling to which such assignments are applicable, since the first paragraph of answer was addressed to the first paragraph of complaint and the second paragraph of answer was addressed to the second paragraph of complaint. p. 360.
2. **LIMITATION OF ACTIONS.—Action on Check.**—Action on a bank check is not barred until ten years under §295, cl. 5, Burns 1914, §293 R. S. 1881. p. 360.
3. **BILLS AND NOTES.—Bank Check.—Liability of Drawer or Signer.**—A check is a written contract for the payment of money and the drawer or signer of the bill by the act of drawing and delivery becomes bound to pay if the acceptor does not. p. 360.
4. **APPEAL.—Review.—Reservation of Exceptions and Errors.**—The refusal of the trial court to allow the proper party to open and close the argument was an error occurring during the trial and should, under §585, cl. 5, Burns 1914, §559 R. S. 1881, be presented in a motion for a new trial to present any question for review on appeal. p. 361.
5. **TRIAL.—Answers to Interrogatories.—Motion for Judgment.—Matters Considered.**—In determining the correctness of the ruling on a motion for judgment on the answers to interrogatories the court looks alone to such answers, the pleadings and the general verdict, every presumption being in favor of the general verdict, and the answer to the interrogatories will prevail over it only when the conflict between the two is such that no evidence possible under the issues could reconcile them; and, where the answers relied on are contradictory and inconsistent, they will not control the general verdict. p. 361.
6. **TRIAL.—Verdict.—Answers to Interrogatories.—Conflict.**—In an action to collect money on a check dishonored because of the insolvency of the bank upon which it was drawn, the answers of the jury to the special interrogatories relied on to overturn the general verdict disclosed, substantially, that the defendant, as attorney for the plaintiff, collected a sum of money due plaintiff; that he deposited the money in the bank in his own name; and that he received nothing in consideration of the execution of the check sued upon, which was given to plaintiff in payment of the money collected by defendant. *Held*, that, as the answers are in

legal effect contradictory and inconsistent, the general verdict should prevail. p. 363.

7. **PRINCIPAL AND AGENT.**—*Deposits of Funds.*—*Liability of Agent.*—Where an agent or trustee deposits money belonging to his principal in his own name, without in some way designating it as trust property, he will be responsible for any loss that may occur to the fund while so deposited and estopped to deny liability. p. 363.
8. **TRIAL.**—*Motion for Judgment on Interrogatories.*—*Answers in Conflict.*—There is no error in overruling a motion for judgment on the answers to special interrogatories where such answers are conflicting and inconsistent. p. 364.

From Carroll Circuit Court; *James P. Wason*, Judge.

Action by John C. Lowe against George A. Williams. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

George A. Williams, for appellant.

John H. Cartwright and *E. B. Sellers*, for appellee.

HOTTEL, P. J.—This is an appeal from a judgment in appellee's favor for \$629.24 in a suit brought by him on a check given to him by appellant for said amount, drawn on A. McCoy & Company's Bank, of Rensselaer, Indiana, and bearing date of April 16, 1904. The transaction which gave rise to the suit has been before this court in two former appeals: *Baughman v. Lowe* (1907), 41 Ind. App. 1, 83 N. E. 255; *Williams v. Lowe* (1911), 49 Ind. App. 606, 97 N. E. 809. The complaint now involved is in two paragraphs. The facts leading up to and connected with the giving of said check as alleged therein are substantially as follows: Appellee was the plaintiff in a foreclosure proceeding in which certain land was ordered sold, and he became the purchaser at such sale and received a certificate of purchase therefor. Toward the close of the year for redemption, appellee gave this certificate to his attorneys, including appellant, who represented him in the foreclosure suit,

so that they might have it to surrender to the redemptioner in case he redeemed from the sale. The owner paid to the clerk of the court the amount necessary to redeem said land and the latter paid it over to said attorneys on April 15, 1904. On the same day appellant deposited the funds so collected in the A. McCoy & Company's Bank, of Rensselaer, in his name. Appellee was notified of the redemption and he came to Rensselaer on April 16, 1904, to make settlement and appellant gave him his (appellant's) check on the A. McCoy & Company's Bank for the amount, less attorneys fees of \$629.24. At the time this check was delivered to appellee the bank had closed for that day and did not afterwards open its doors for business and was later declared a bankrupt. On the following business day appellee placed said check in a bank at Monticello, Indiana, where he lived, for collection. This check was not presented to the bank on which it was drawn for the reason that such bank never opened after appellees received said check. Appellant was notified of such fact and payment of the check was demanded of him and he refused to pay. The only difference between the two paragraphs that we need mention is that the check in suit is set out as an exhibit to the first paragraph and is set out in the body of the second paragraph. Numerous answers were filed to each of said paragraphs, of which the first, second, tenth and eleventh, only are set out in appellant's brief. The first and second plead the six years statute of limitations to the first and second paragraphs of complaint, respectively, and a demurrer to each was sustained by the court. The ninth paragraph is a plea of no consideration. There was a trial by jury. With their general verdict the jury returned answers to interrogatories. Appellant's motions

for judgment on such answers and for new trial were overruled.

The errors assigned and relied on for reversal are: (1) Error of the court in sustaining appellee's demurrer to appellant's first paragraph of answer "to appellee's complaint"; (2) error of the court in sustaining appellee's demurrer to appellant's second paragraph of answer "to appellee's complaint"; (4) "the court erred in refusing to allow the appellant to open and close the argument to the jury"; (5) error in overruling appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict.

No question is presented by either the first or second assigned errors because the record does not disclose any ruling to which such assign-

1. ments are applicable. The first paragraph of answer was addressed to the first paragraph of complaint and the second paragraph of answer was addressed to the second paragraph of complaint, and neither was addressed to "the complaint." However, our examination of the complaint convinces us that each paragraph thereof is based on the check, and this being true,

2. the action is not barred by the six years statute of limitations. §295, cl. 5, Burns 1914, §293 R. S. 1881; *Culver v. Marks* (1890), 122 Ind. 554, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. 377; *Henshaw v. Root* (1877), 60 Ind. 220, 222; *Sutton v. Baldwin* (1896), 146 Ind. 361, 45 N. E. 518; *Hoffman v. Hollingsworth* (1894), 10 Ind. App. 353, 356, 37 N. E. 960.

A check is a written contract for the payment of money and the drawer or signer of the bill, 3. by the act of drawing and delivery, becomes bound to pay if the acceptor does not. 1 Parsons, Notes and Bills 54. *Offutt v. Rucker*

(1891), 2 Ind. App. 350, 354, 27 N. E. 589. See also, cases cited, *supra*.

Appellant's fourth assigned error presents no question. The refusal to allow appellant to open and close the argument was an error oc-

4. curring during the trial and should have been made the ground of a motion for new trial in order to present any question for review here. §585, cl. 8, Burns 1914, §559 R. S. 1881; *Tilden v. Whitely, etc., Co.* (1901), 27 Ind. App. 53, 60 N. E. 963; *Siberry v. State* (1897), 149 Ind. 684, 39 N. E. 936, 47 N. E. 458.

It is questionable whether appellant has by his brief presented the fifth assigned error. In any event the ruling complained of was not, in

5. our judgment, erroneous. In determining the correctness of the ruling on a motion for judgment on the answers to interrogatories the court looks alone to such answers, the pleadings and the general verdict. *Beard v. Goulding* (1913), 55 Ind. App. 398, 103 N. E. 875; *Meyers v. Winona, etc., R. Co.* (1914), 58 Ind. App. 516, 106 N. E. 377. Every presumption is indulged in favor of the general verdict, and the answers to interrogatories will be permitted to prevail over it only in cases where the conflict between the two is such that no evidence possible under the issues could reconcile them. *Chicago, etc., R. Co. v. Schenkel* (1914), 57 Ind. App. 175, 104 N. E. 50; *Meyers v. Winona, etc., R. Co., supra*. Where the answers relied on to overturn the verdict are themselves contradictory and inconsistent they will not control the verdict. *Chicago, etc., R. Co. v. Schenkel, supra*; *Meyers v. Winona, etc., R. Co., supra*; *Wise v. Cleveland, etc., R. Co.* (1915), 183 Ind. 484, 108 N. E. 369.

The interrogatories and answers here relied on

are as follows: "1. Did A. McCoy and Co's. Bank follow the directions of the defendant, George A. Williams, in making the deposit of the money realized in redemption of the lands described in the complaint? Answer: No. 2. Did George A. Williams know at the time he made the deposit in A. McCoy and Co's Bank that the bank officers were making the deposit in the defendant's name? Answer: No. 3. Did defendant George A. Williams, receive anything of value in consideration of the execution of the check set out in the complaint? Answer: No. 4. What thing of value did the defendant receive for the execution of the check sued upon? Answer: Nothing. 5. Did defendant claim that the money evidenced by the check sued on belonged to him? Answer: No. 6. Did the defendant, Williams, on April 15th, 1904, when he deposited the check given by the clerk of the Jasper Circuit Court of Indiana, receive from said bank a deposit slip showing how the deposit had been entered on the books of the bank? Answer: Yes. 7. Did the defendant, George A. Williams, on the 16th day of April, 1904, ascertain and know by ten o'clock a. m. of said day that the deposit made by him on the 15th day of April, 1904, in the bank of A. McCoy and Company was entered upon the books of said bank in the individual name of George A. Williams? Answer: Yes. 8. Did the defendant, George A. Williams, on April 15th, 1904, receive from the clerk of the Jasper Circuit Court of Indiana, a draft for \$646.17, which had been paid to the said clerk in redemption of lands sold to plaintiff upon plaintiff's judgment, and which sum included attorneys fees, as well as the principal and interest of the plaintiff's claim? Answer: Yes."

These answers are in legal effect inconsistent and

contradictory when viewed in the light of the facts disclosed by the complaint and the law ap-

6. plicable thereto. Where an agent or trustee deposits money belonging to his principal, "he can escape the risk only by making the deposit in his principal's name, or by so distinguish-

7. ing it on the books of the bank, as to indicate in some way, that it is the principal's money.

If he deposit in his own name, he will not, in case of loss, be permitted to throw such loss on his principal. * * * In such a case, the good faith or intention of the trustee is in no way involved. Having for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with legal title, it follows as a necessary consequence, when a loss occurs, he will not be permitted to say, as against his *cestui que trust*, that the fact is not as he voluntarily made it appear. * * * Whatever diversity of opinion may be found in respect to the rights of the bank, or other creditors of the depositor, the authorities agree that a trustee who either invests or deposits trust money in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund while so invested or deposited." *Naltner v. Dolan* (1887), 108 Ind. 500, 504, 505, 8 N. E. 289, 58 Am. Rep. 61.

The answers to interrogatories show that appellant, as appellee's attorney, received from the clerk of the Jasper Circuit Court a draft for the redemption money due appellee, and that he deposited the same in his own name in the bank on which the check in suit was given; that when he made the deposit he was given a deposit slip showing that the deposit had been entered to his credit on the books of such bank.

The appellant by so depositing in the bank funds belonging to appellee thereby appropriated the funds and became appellee's creditor in an amount equal to the amount of the funds of appellee so deposited, and under the issues appellee was entitled to prove and, for the purposes of the question under consideration, we must assume that he did prove that it was to discharge this indebtedness that the check in suit was given. It follows that the answers of the jury that appellant received no consideration for such check is inconsistent

8. ent with such other answers and hence no error resulted from overruling the motion for judgment on the answers to interrogatories.

We find no reversible error in the record and the judgment below is therefore affirmed.

NOTE.—Reported in 113 N. E. 471. Money deposits made by persons acting in a fiduciary capacity, 31 Cyc 1478, 1479.

BROWN ET AL. v. YOUNG.

[No. 8,899. Filed December 9, 1915. Rehearing denied April 20, 1916. Transfer denied June 7, 1916.]

1. CANCELLATION OF INSTRUMENTS.—*Complaint.*—*Damages.*—*Allegation of.*—In an action to set aside a contract for the sale of real estate and deeds made pursuant thereto as fraudulent and void, the complaint is not fatally defective for failure to allege specifically the value of the real estate conveyed and the consequent damages, where there is an averment that nothing of value was received by the plaintiff as a consideration for executing the deeds to the realty involved, and it is clearly shown by the allegations that all the parties treated the realty as of value, the reasonable inference to be drawn from such averments being that damage resulted. p. 372.
2. CANCELLATION OF INSTRUMENTS.—*Complaint.*—*Statu Quo.*—In an action to set aside deeds as fraudulent, the complaint is not fatally defective for failure to allege therein that the defendants had been placed in *statu quo*, where there are averments showing that the plaintiff received nothing of value as a consideration for the execution of the deeds involved in the action. p. 373.
3. CONTRACTS.—*Right to Rescind.*—*Waiver by Delay.*—The length of time a party to a contract permits to elapse does not necessarily

Brown v. Young—62 Ind. App. 364.

determine the right to rescind, the governing consideration being whether the delay has been long enough, under the circumstances of the particular case, to result in prejudice to the other party. p. 374.

4. **CONTRACTS.—Rescission.—Notice.**—A formal written notice is not necessary to rescind a contract, it being sufficient that there is some positive act on the part of the party who rescinds that shows such an intention. p. 374.
5. **CANCELLATION OF INSTRUMENTS.—Complaint.—Sufficiency.—Disaffirmance of Contract.**—In an action to set aside a contract for the sale of real estate and deeds made to defendants pursuant thereto as fraudulent, the complaint is sufficient as against a demurrer raising the question as to whether the contract was disaffirmed within a reasonable time where it avers that the plaintiff "has long prior to this date disaffirmed the said deed" to the defendant, and "also the written contract * * * and given proper and due notice of such disaffirmance and demanded reconveyance thereof to herself," since the court is bound to resolve all reasonable inferences in support of the complaint. p. 374.
6. **APPEAL.—Ruling on Demurrer.—When Grounds for Reversal.**—Under the provisions of §350 Burns 1914, §345 R. S. 1881, no objection taken by demurrer and overruled, is sufficient to reverse the judgment, if it appears from the whole record that the merits of the cause have been fairly determined. p. 375.
7. **TRIAL.—Conclusions of Law.—Complaint.—Issues.**—Where a complaint has been treated by the trial court and the attorneys as an action not only to rescind a contract of sale of property and to cancel deeds executed in accordance therewith but also as one to quiet title, though imperfect when viewed as such, a conclusion of law by the court quieting title in the plaintiff to the property involved in the action is not objectionable as being without the issues. p. 375.
8. **TRIAL.—Conclusion of Law.—Findings of Fact.—Held,** that under the findings of fact, appellants are not entitled to a conclusion of law showing lack of diligence on the part of the appellee in seasonably disaffirming the contract and agreement. p. 377.

From Porter Superior Court; *Harry B. Tuthill*, Judge.

Action by Josephine E. Young against Harvey H. Brown and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Frank B. Pattee and *Erwin McDowell*, for appellants.

Peter Crumpacker and *Fred Crumpacker*, for appellee.

SHEA, J.—This was an action upon a complaint filed by appellee against appellants. The cause was tried upon the second paragraph of complaint. In the language of appellants' counsel in his brief, this was an action to set aside a contract for sale of certain real estate, to set aside certain deeds of appellee to appellants as fraudulent and void, and to quiet the title to the real estate embraced in said contract and deeds in appellee as against appellants. Separate demurrers were filed by Harvey H. Brown and Leila A. Brown on the ground that the second paragraph of complaint did not state facts sufficient to constitute a cause of action against either of appellants. The demurrers were overruled and exceptions properly saved. Answers in general denial were filed by the Browns. Appellant Jouvenat was defaulted. The cause was first tried in the Lake Superior Court, where the finding and judgment was against appellants. They then availed themselves of the provisions of the statute entitling them to a new trial as of right, and the cause was taken on a change of venue to the Porter Superior Court where a trial again resulted in a judgment against appellants, from which this appeal is taken.

The complaint alleges, in substance, that on September 1, 1904, appellee Josephine E. Young was the owner of certain real estate in Norcott's addition to Indiana City, Indiana; that on said date she entered into an agreement with appellant Harvey H. Brown, in which she agreed to convey to him or to his order on date of said contract, blocks, 14, 20 and 21, and block 13 except lot 3 therein, described in the complaint, by warranty deed, subject to a pro rata share of a mortgage incumbrance of \$2,000, together with interest at six per cent. for two years, which pro rata share of said

incumbrance said Brown assumed and agreed to pay. It was further agreed that appellee would convey by warranty deed all the balance of the described real estate to Charles Jouvenat as a trustee to carry out certain provisions in said contract, which trust deed said Jouvenat was to hold as an escrow. It is charged that the contract further provided that Brown should turn over to Jouvenat as such trustee, and as an escrow, \$7,000 par value of the stock of the Ozark Live Stock Company, an Illinois corporation theretofore formed according to law; that said trustee was to hold the real estate and stock until September 1, 1905, for the purpose of enabling Brown to pay the sum of \$7,000 in cash to appellee, and in the event Brown did pay the sum to appellee within said time, the trustee was then and in that event to turn over and deed to said Brown all the real estate and also to return to him the capital stock of the Ozark Live Stock Company, subject to the incumbrance aforesaid; that in case Brown should fail to pay appellee the sum of \$7,000 then the real estate was to be conveyed to her, and said trustee was also to deliver to her said capital stock. Brown was also entitled by the terms of the agreement to a deed to any lot or block in said real estate on or before September 1, 1905, on the payment of \$25 per lot in cash, except lots fronting on Lake Michigan, for which he was to pay the sum of \$35 per lot in cash. Said contract was duly recorded on November 19, 1904. A copy of the agreement is filed with and made a part of the complaint. Said Jouvenat accepted said trust, qualified as trustee, and held the deed, the contract and the stock in escrow; that appellee is an unmarried woman, the daughter of Joseph E. Young, wholly unaccustomed to business transactions, and that

she never had any business dealings of any consequence; that her father, who was an old man, approximately eighty years of age, and feeble, acted for her in making said agreement; that appellee did, on said date, convey to said Brown blocks 13 and 14 except lot 3, and at the request of Harvey H. Brown conveyed to appellant Leila A. Brown blocks 20 and 21 by warranty deeds, which were duly recorded; that said deeds were made subject to the incumbrance on all of said property, which the grantee therein assumed and agreed to pay pro rata; that prior to and leading up to the execution of said agreement and deeds, appellant, Harvey H. Brown, falsely and fraudulently and with intent to cheat and defraud appellee, represented to her and her father as her agent, that said Ozark Live Stock Company was solvent and owned over 1,300 acres of valuable land in Crawford County, Missouri. The particular description of the land is then set out. He further represented that said land was valuable land, and worth \$100 per acre; that the Ozark Live Stock Company was in the possession of said real estate, was the owner in fee simple thereof, and that its title was unclouded except for an incumbrance of \$1,000 secured by a mortgage thereon. It was further represented by Brown to appellee and her father that the Ozark Live Stock Company held in its own right and free of all incumbrance 5,000 head of good healthy sheep on said premises, and also held and owned in its own right more than twenty head of cattle, and more than ten horses on said real estate; that outside of said \$1,000 mortgage the Ozark Live Stock Company was not indebted to any one on any account; that it was capitalized for \$150,000; that it had a right to and did hold said property in its corporate capacity and its capital stock was worth

par value; that said stock put up in escrow with said Jouvenat as trustee was then and there of the value of \$7,000; that appellants gave no consideration, whatever, except as stated above, for the execution of said contract or deeds, or for the conveyance of the lands as heretofore set out; that appellant, Leila A. Brown, gave no consideration whatever for the real estate deeded to her. Appellee said that she relied upon the representations of said Brown and each and all of them; that she knew nothing about the facts, neither did her agent know about the facts except what was represented, as alleged, by said Brown; that neither appellee nor her agent had ever visited said lands in Crawford County, Missouri; had never been in that vicinity, and knew nothing of the character of said lands, the title thereof, nor facts concerning said sheep, cattle or horses, and had no opportunity of knowing said facts; that by reason of the aforesaid representations of said Brown she was induced to enter into the agreement, and was induced to execute the deeds to Jouvenat and to Harvey H. and Leila A. Brown; that, but for the statements and representations of said Harvey H. Brown and her reliance thereon and her want of knowledge of the facts, she would not have entered into said agreement, nor have executed said deeds or contract; that each and all of said statements and representations made by said Brown at the time they were made, were false, fraudulent and untrue, and were made for the purpose of deceiving, cheating and defrauding appellee and for the purpose of fraudulently procuring the execution of the contract and deeds. It is further alleged that said Brown and the Ozark Live Stock Company were wholly insolvent and unable to pay their debts at the time of the

execution of said contract and deeds; that the lands which said Brown pretended were owned by the Ozark Live Stock Company were at the time almost wholly worthless; that they were situated in the Ozark mountains, consisted of rocky hills and mountains and were wholly unfit for agricultural and grazing purposes; that said Ozark Live Stock Company did not at the time, or since that time, own any cattle, sheep or horses whatsoever; that the statements of Brown representing appellant's ownership of said lands and stock were false and fraudulent and made for the fraudulent purposes stated; that the statements of said Brown that said real estate was unincumbered were also false and untrue, and made for the purpose aforesaid; that at the time the statements were made, there was a mortgage covering all of the real estate executed by Brown to Karl D. Norvel, in trust, for the Bank of Steelville, in Crawford County, Missouri; that said Brown executed the mortgage while he claimed to hold the title thereto on January 20, 1902, for the sum of \$1,525, which mortgage was duly acknowledged and recorded; that in 1903, said bank brought suit to foreclose said mortgage against Harvey H. Brown and the Ozark Live Stock Company, and on February 27, 1906, judgment was rendered in said cause for \$1,690.90 and costs of suit, in favor of the bank; that thereafter in said year 1906, said lands were sold pursuant to an order and decree delivered to the sheriff of said county to the Bank of Steelville; that said land was never redeemed from said sale; that said stock, held by Jouvenat as trustee, was never of any value whatever, all of which said Brown well knew; that appellee refused to accept and take said stock after June 1, 1905, and refused to permit said Jouvenat to execute a deed for the real estate, so held in trust

by him, to said Brown; that said Young had long prior to said date disaffirmed said deeds to the Browns and Jouvenat, and had also disaffirmed said agreement, had given proper and due notice of said disaffirmance and demanded reconveyance to herself. Appellee asks judgment canceling said contract and deeds; that her title in and to said real estate be quieted in her as against each of appellants, and for all other proper relief. The provisions of the agreement are generally set out in the complaint.

Upon request the court found the facts specially. Said findings cover nineteen printed pages of appellants' brief. No good purpose could be served by setting them out in detail. It is sufficient to say that they find all the material allegations of the complaint to be true, upon which the court stated conclusions of law as follows: That the law is with appellee and she should have her title quieted to all of the real estate described in the complaint; that the misrepresentations of appellant Harvey H. Brown were a fraud upon appellee; that said contract entered into between appellee and appellant Brown was in fraud of appellee and fraudulent, and said deeds to appellants Harvey H. Brown, Leila A. Brown and Jouvenat as trustee, were each and all in fraud of appellee, and said contract and deeds should be set aside for fraud and declared null and void and of no effect. Judgment was rendered accordingly.

It is very earnestly insisted on behalf of appellants that the complaint is obnoxious to a demurrer for the following reasons: (1) For failure to allege damage or injury; (2) for failure to disaffirm and institute the action seasonably; (3) for failure to place appellants in *statu quo* and show a willingness or ability so to do. It is also assigned and argued

that the court erred in stating its conclusions of law. Appellants very earnestly insist that the complaint is defective for the reason that it does not specifically allege that appellee was damaged because of the execution of the deeds and contract referred to in the complaint. Appellants cite and rely mainly upon the case of *Srader v. Srader* (1898), 151 Ind. 339, 51 N. E. 479, which holds that a complaint failing to show that the defrauded party was damaged is fatally defective. The facts in the *Srader* case are essentially different in all respects from the facts disclosed in the case at bar. For instance, in the *Srader* case a cash payment of \$200 was made; an existing mortgage of \$500 was assumed by the purchasing parties and notes were executed for the balance of the purchase money. The court in that case says: "There is no showing that these notes are not amply good, and worth their full face value. For aught appearing in the complaint, the sale and conveyance of the land, under all of the circumstances, may have been conducive to the best interests of the grantor." In the case at

bar the facts alleged in the complaint disclose that appellee received nothing of value from appellants. The stock in the Ozark Live Stock Company was wholly worthless, the land was covered by a mortgage which was afterward foreclosed; there were no sheep, cattle or horses on the premises owned by said corporation, and therefore it may be very reasonably inferred that appellants paid no part of the mortgage, because of the specific allegation hereinafter set out that appellee received nothing of value from either of the Browns by way of consideration for the transfer and agreement to transfer said real estate. We therefore conclude that from the allegations of the complaint we may reasonably infer damages

because of the fraudulent conduct of appellants. It is clearly shown that all the parties treated appellee's real estate as having value, and it is specifically alleged that appellee received nothing of value from appellant Brown, therefore damages are shown to have resulted. This is the reasonable inference to be deduced from the language used. This court is of the opinion that the rule as laid down in the case of *Ross v. Hobson* (1891), 131 Ind. 166, 26 N. E. 775, should be applied in the present case as to the failure to allege the value of the real estate conveyed, and consequent damages specifically. See also *Nysewander v. Lowman* (1890), 124 Ind. 584, 24 N. E. 355; *Gardner v. Mann* (1905), 36 Ind. App. 694, 76 N. E. 417; *Murray v. Jennings* (1875), 42 Conn. 9, 19 Am. Rep. 527.

What is said with respect to the failure to allege damages, is also true with respect to the third objection to the complaint, namely, that

2. there is no allegation showing appellants were placed in *statu quo*. Appellee, having received nothing of value from appellants, could not tender back to them any property or thing of value in order to place them in *statu quo*. The allegations of the complaint are sufficient to warrant the court in hearing evidence upon the question as to whether any consideration had been paid by appellants to appellee, including any amounts which may have been paid upon the portion of the mortgage debt assumed. It is specifically alleged in the complaint that Leila A. Brown gave no consideration whatever, and that Harvey H. Brown gave no other or different consideration than the deposit of the Ozark Live Stock Company's capital stock, with the written agreement containing the stipulations hereinbefore set out. All that a party who seeks to rescind a contract can do in order to

place the adverse party in *statu quo* is to return that which he has himself received. Clark, Contracts (3d ed.) 295, and authorities cited.

The second alleged reason is the failure to disaffirm the contract seasonably. It is very earnestly argued, and there is much citation of

3. authority in support of appellant's contention. We shall proceed to a consideration of that objection. The question of how much time a party to a contract has permitted to elapse is not necessarily determinative of the right to rescind, the immediate consideration being whether the period has been long enough to result in prejudice to the other party. 6 R.C.L. 932; *Basye v. Paola Refining Co.* (1909), 79 Kan. 755, 101 Pac. 658, 131 Am. St. 346, 25 L. R. A. (N.S.) 1302; *Roberts v. James* (1912), 83 N. J. L. 492, 85 Atl. 244, Ann. Cas. 1914 B 859.

What is a reasonable time necessarily depends upon the circumstances of each particular case. *Roberts v. James, supra*. A formal written notice

is not necessary in order to rescind the contract. Some positive act on the part of him who would rescind that shows such an intention is sufficient. 6 R. C. L., *supra*.

The language of the complaint with respect to the disaffirmance of said contract as above set out, which the demurrer concedes to be true,

5. is as follows: "That said Young has long prior to this date disaffirmed the said deed to the said Harvey H. Brown and the said deed to the said Leila A. Brown and the said deed to the said Jouvenat, and had also disaffirmed the said written contract or agreement and given proper and due notice of such disaffirmance and demanded reconveyances thereof to herself." This allegation is amply sufficient to withstand a demurrer under

the rule as laid down in the case of *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N.E. 675, 102 N.E. 99, which requires this court to resolve all reasonable inferences in support of the allegations of the complaint. See also *Kahle v. Crown Oil Co.* (1913), 180 Ind. 131, 138, 100 N.E. 681; *Taylor v. Griner* (1913), 55 Ind. App. 617, 620, 104 N.E. 607; *Darter v. Grubb* (1913), 56 Ind. App. 206, 208, 102 N.E. 843; *Rader v. Barrett Co.* (1914), 59 Ind. App. 27, 34, 108 N.E. 883, 884.

Appellants' learned counsel, in an exhaustive brief, have cited much authority with respect to the infirmities pointed out in the complaint, all of which relate to a period prior to the rule announced by the Supreme Court in the case of *Domestic Block Coal Co. v. DeArmey*, *supra*, and can not therefore be held to be authority for their contention.

6. The rule as now followed by both the Supreme Court and this court, and which we apply in this case, is in complete harmony with our statutory provision, and in the judgment of this court subserves the ends of justice.

Section 350 Burns 1914, §345 R. S. 1881, reads as follows: "The judgment upon overruling a demurrer shall be that the party shall plead over; and the answer or reply shall not be deemed to overrule the objection taken by demurrer. But no objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined. * * *" See also §§407, 700 Burns 1914, §§398, 658 R. S. 1881.

With respect to the conclusions of law, it is argued that the first conclusion is entirely outside the issues. It quiets the title to the property

7. generally in appellee. While the complaint is by no means a model pleading, it seems

to have been treated by the trial court, and also by the attorneys, as an action to quiet title, as well as to rescind the contract and cancel the deeds. In the first section of the brief filed by appellant's counsel, which we have set out, they state that this was an action to quiet title, and in the prayer for relief, which we have also set out, there is a demand that the title be quieted in appellee as against appellants' claim. We are therefore constrained to hold that this conclusion of law is within the issues.

Appellants also insist that upon the facts found they were entitled to a conclusion of law showing lack of diligence on the part of appellee in seasonably disaffirming the contract and agreement. In the well reasoned case of *Roberts v. James, supra*, the court says the rule with respect to diligence "like other rules of justice must be so applied in the practical administration of justice as shall best subserve, in each particular case, the undoing of wrong, and the vindication of the right.' * * * What is a reasonable time necessarily depends on the circumstances of each particular case. It is settled in the English courts that unless the situation of the other party has changed to his detriment, the contract continues until the party defrauded elects to avoid it, and he may keep the question open as long as he does nothing to affirm the contract. *Clough v. London and Northwestern Railway* (1871), L. R., 7 Ex. 26; 41 L. J. Exch. 17; *Morrison v. Universal Marine Insurance Co.* (1873), L. R., 8 Ex. 197; 42 L. J. Exch. 115; *United Shoe Machinery Co. of Canada v. Brunet* (1909), A. C. 330. He may even wait until action is brought against him (*Clough v. London and Northwestern Railway, ubi supra*), and a plea setting

Kessler et al. v. Grocers' Chemical Works—62 Ind. App. 377.

up the fraud amounts to a rescission of the contract." See also *Bayse v. Paola Refining Co., supra*.

We conclude that appellants are not entitled

8. to the conclusion of law for which they contend, under the finding of facts.

From an examination of the whole record we are of the opinion that a correct conclusion was reached in the trial court. Under such circumstances this court will not disturb the judgment for technical objections, however vigorously they may be urged. Judgment affirmed.

NOTE.—Reported in 110 N. E. 562. See under (2), (3), (4) 9 C. J. 1236, 1242, 1240; 6 Cyc 329, 300; 50 Am. Dec. 672; (7) 38 Cyc 1978.

KESSLER ET AL. v. GROCERS' CHEMICAL WORKS.

[No. 8,937. Filed June 8, 1916.]

MECHANICS LIENS.—*Time for Filing.*—*Last Work Done.*—Where, in an action to foreclose a mechanic's lien the evidence discloses that the plaintiff, a brick contractor, some time after the completion of the brickwork, was required to return to the building to complete his contract by repairing certain defective work, which work could not have been performed at the time the brickwork was done nor prior to the completion of the carpenter's work, such service being rendered under the direction and at the request of the defendant's architect without any additional charge being made therefor, the date of such work may be considered as fixing the commencement of the period in which a mechanic's lien could have been filed.

From Vanderburgh Superior Court; *F. M. Hostetter*, Judge.

Action by Philip Kessler and others against the Grocers Chemical Works. From a judgment for defendant, the plaintiff appeals. *Reversed*.

Albert G. Veneman and *William C. Welborn*, for appellants.

William P. Miedreich and *Harry C. Dodson*, for appellee.

McNUTT, J.—This was a suit by appellants, who were partners doing business under the firm name of Kessler, Riebenthaler & Company, against appellee, a corporation, to foreclose a mechanic's lien. Appellee filed answer to the complaint in general denial, also a counterclaim, to which appellants' demurrer was overruled, and the cause was put at issue by appellants' reply in general denial. At the close of appellants' evidence in chief, appellee moved the court for judgment in its favor on the ground that appellants had failed to show that the notice of lien had been filed in time, which motion the court sustained. The overruling of appellants' motion for a new trial is the only error assigned which need here be considered.

It clearly appears from appellants' evidence in chief that on January 26, 1912, appellee and one Hoffman entered into a written agreement for the construction of a three-story brick factory building in the city of Evansville, Indiana, on the real estate described in the complaint and owned by appellee; that said contractor Hoffman employed appellants to do the brickwork and furnish materials for \$5,700. The specifications for the construction of the building contained, among others, the following provisions:

“Brick layer is to work in harmony with * * * other contractors, to assist in the setting of all materials of all kinds which come in contact with his work. After the walls have thoroughly set he is to fill in around the building and repair all paving that has been disturbed. All joints between brick and stone and all brick laid back of stone shall be made tight to insure uniform settling. Point up under the sills after the work is set to make same air tight. * * * All holes which may be left in the brick work, for use of build-

Kessler et al. v. Grocers' Chemical Works—62 Ind. App. 377.

ing scaffolding or any other cause, shall be neatly filled up and finished by the mason when the building is nearing completion. All cracks of any kind which may show around frames, or in any other part of the brick work shall be carefully closed up with cement.
* * * All brick to be laid at such times and in the best manner for the interests of all contractors, and with the general progress of the building always considered. All brick work as shown necessary to complete the building is to be done without additional expense to the owner."

It is also shown by the testimony of appellants that the brickwork was completed some time in June, 1912, but that in August, after the other contractors had performed their part of the work, appellants went back to finish up; that they requested appellee to indicate what was lacking, and its architect, in the presence of appellee's secretary, gave them a note of what he wanted done to finish up the work, and it was done; that some loose bricks that had been knocked loose by the carpenters were replaced; some pointing up of the brickwork was done; wooden strips were put in above the windows; that appellants did some work around the doors and put in bumpers for the sliding doors, all of which required the work of one man for a day and a half; that it was the custom that damage and defects by other contractors should be fixed up by the bricklayers; that no extra charge was made for any of this work for the reason that it was required by their contract; that this work was done about August 20 or 22, 1912; that appellants filed their mechanic's lien, which was introduced in evidence, on October 10, 1912; that there was due and owing them for work done under their contract a balance of \$851.05, which was past due and unpaid.

It was also shown that there was pending in the same court a suit by appellee against the said contractor on his bond, in which appellee alleged in its complaint, in substance, that the contractor had failed to pay appellants in full for their work and labor done, and for materials furnished, by them in constructing the brickwork on the building; that there was due appellants \$844, for which they had filed a lien against the building and that, unless said contractor paid or secured the payment of said lien, suit which was then threatened, would be brought against appellee to its great damage. It was also shown that a suit by the contractor against appellee was pending in said court for the balance of contract price, and that appellee filed a plea in abatement, which was sworn to by one Boink, secretary of appellee, in which plea it was alleged, in substance, that appellants were subcontractors and had not been paid for material, work and labor, and to protect themselves, had filed a lien against the building for \$844; that there was more due appellants than said contractor claimed in his suit and that under his contract he was obliged to pay said appellants, which he had failed to do. The labor performed, and materials furnished, as shown by this evidence, appellants were required to perform and furnish in order to complete their contract, and such work could not be performed at the time the brickwork was done, nor until the carpenters had finished their work. It is also shown that said work was done at the request of appellee's architect in the presence of appellee's secretary. The complaint filed by appellee against the contractor, and the plea in abatement filed by appellee to the contractor's suit, tended to show that appellee recognized that appellants' lien was valid. Appellee cites one

Indiana authority to sustain its contention that the lien in question was not filed in time, being the case of *Sulzer-Vogt Machine Co. v. Rushville Water Co.* (1902), 160 Ind. 202, 65 N. E. 583; but the case does not sustain appellee's contention. In that case the court said: "After the owner had accepted the boiler, fixtures, etc., as fully completed, and had for more than four months been in the possession thereof, the contractor ceased to be the agent of the owner, in the absence of an objection by the latter that the contract had not been completed, to order additional materials that might be made the basis for an extension of the time in which to file a lien for the original work and materials furnished by the subcontractor." Other cases cited by appellee on this point are from other jurisdictions. Some of these are from Pennsylvania, and this court in the case of *Conlee v. Clark* (1896), 14 Ind. App. 205, 208, 42 N. E. 762, 56 Am. St. 298, speaking of the leading Pennsylvania case said: "The case of *Harrison & Bro. v. Homeopathic Assn.*, 134 Pa. St. 558, and possibly some other Pennsylvania cases do indeed sustain this view, but we cannot regard it as in consonance with the spirit of our statute, nor in harmony with the weight of authority." It was decided by this court in the *Conlee* case, *supra*, that work done by the contractor to remedy a defect in the performance of his work caused by his own negligence, for which he makes no charge but which is necessary to complete the performance, may be considered the last work done for the period of fixing the time of filing the lien under the statute. *Jeffersonville Water Supply Co. v. Riter* (1894), 138 Ind. 170, 37 N. E. 652, was a case where a standpipe was so far completed as to be ready for testing and inspection in September, but it was not actually tested by filling

with water until November, when leaks were found which were closed and the work finally received. The court held that the work was only then finished, the additional labor being in fact necessary and performed by the mechanic. See also *Whitcomb v. Roll* (1906), 40 Ind. App. 119, 81 N. E. 106; *Stephenson v. Ballard* (1882), 82 Ind. 87; *Hartzell v. Pranger* (1916), — Ind. App. —, 112 N. E. 530.

Under the authorities cited above and our mechanic's lien law, which this court has said should be liberally construed to the end that a mechanic or materialman shall have the protection which the statute was intended to give, where it is clear that one falls within the protection of the statute (*Toner v. Whybrew* (1911), 50 Ind. App. 387, 98 N. E. 450) and the evidence introduced by appellants before they rested their case, we are of opinion that the trial court should have found for appellants. It follows that the finding and judgment of the trial court is not supported by sufficient evidence and is contrary to law, and that the court erred in refusing a new trial.

The cause is reversed, with instructions to sustain appellants' motion for a new trial.

NOTE.—Reported in 113 N. E. 317. Mechanic's lien, last work done as fixing time for filing, 12 L. R. A. (N. S.) 864; 27 Cyc 147.

OSTERHAUS v. CREVISTON ET AL.

[No. 8,976. Filed February 24, 1916. Rehearing denied June 8, 1916.]

1. APPEAL.—*Perfection of Appeal.*—*Assignment of Errors.*—*Failure to Amend.*—Where an appellant died pending submission of the cause and his heirs were substituted as appellants on notice served on appellees, the appeal will not be dismissed because of the failure to formally amend the assignment of errors to correspond with the order of substitution. p. 386.
2. FRAUDS, STATUTE OF.—*Application.*—*Parol Gift of Lands.*—A parol gift, or a verbal contract for the sale of land, may be taken

out of the operation of the statute of frauds by clear and definite proof of the contract or gift, followed by full possession, use and control of the land. p. 389.

3. **FRAUDS, STATUTE OF.—Parol Gifts.—Evidence.**—While a parol gift of land, and the facts relied on to take the case out of the statute of frauds, must be clearly established by satisfactory proof yet the evidence need not be of any particular kind or class and the ultimate fact of gift may be inferred from facts and circumstances proven by the evidence, if they are sufficient. p. 389.
4. **SPECIFIC PERFORMANCE.—Right to.—Parol Gift of Land.**—Where a donee has accepted a parol gift of land, has taken possession, made permanent and valuable improvements thereon and has discharged all his obligations in relation thereto, he is the equitable owner of the land and may enforce an agreement to convey or may quiet his title to the land. p. 389.
5. **GIFTS.—Action.—Gifts by Parol.—Sufficiency of Evidence to Establish.**—Where, in an action to establish ownership of land claimed by defendants as a parol gift, there was evidence tending to show that the donor said he intended to buy a farm for the defendants and after he bought stated that it was their farm, and it was indisputably established that they took possession and lived thereon continuously, cleared the land, paid the taxes and made permanent improvements, though there was some controversy as to who paid for the same, the evidence was sufficient to establish an absolute gift to defendants and they were entitled to a deed. p. 390.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Harry W. Osterhaus against Dena Creviston and others, in which defendants Creviston cross-complained. From a judgment for cross-complainants, the plaintiff appeals. *Affirmed*.

John Q. Cline, Claude Clyne, Ulysses S. Lesh and Schorr & Wessellman, for appellant.

Fred H. Bowers, Milo N. Feightner, George M. Eberhart and Sumner Kenner, for appellees.

FELT, P. J.—Appellant, Harry W. Osterhaus, brought suit against appellees, Dena and Jacob W. Creviston et al., for partition of thirty acres of real estate in Huntington County, Indiana. In substance it was alleged that, on February 3, 1913,

Harry Osterhaus died intestate, the owner of said real estate, leaving as his only heirs at law appellant and appellee, Dena Creviston, each of whom was alleged to be the owner of the undivided one-half of said real estate; that Jacob W. Creviston was the husband of Dena Creviston, and the other defendants to the suit were alleged to have some claim or lien on the land which is not involved here.

Issues were joined on the complaint by answer in general denial of all the defendants and by special paragraph of answer by Dena and Jacob W. Creviston. In their special answer it was alleged, in substance, that in 1908 said Harry Osterhaus became the owner in fee simple of the real estate in controversy, and that he gave it to appellees, Dena and Jacob W. Creviston; that in pursuance of such gift they moved upon said land, took full and absolute possession thereof and made valuable and lasting improvements thereon by erecting a house and barn, clearing, fencing and ditching the land and by otherwise improving the same, which improvements were of the value of \$8,000; that they made said improvements and held possession of the land as the owners thereof, all with the knowledge and consent of said Harry Osterhaus.

Appellees also filed a cross-complaint in two paragraphs, in the first of which they alleged that they were the owners in fee simple of the real estate and asked to have their title quieted. In the second paragraph, they alleged in substance that Harry Osterhaus, deceased, was in his lifetime the owner of said real estate; that while such owner he agreed verbally with cross-complainants that he would convey and give said real estate to them in consideration of love and affection, and in consideration that they would give him a home and

care for him at such times as he might see fit to make his home with them, which they agreed to do; that pursuant to said agreement and relying thereon, they took possession of said real estate and improved it in substance, as above stated; that they have held the continuous possession thereof as such owners since they entered into the aforesaid agreement with decedent; that they have fully kept and performed all the terms of said agreement by them to be performed; that on February 3, 1913, said Harry Osterhaus died without having conveyed said real estate to them. The prayer is that their title be quieted and that the court appoint a commissioner to execute to them a deed for said real estate.

The judgment in this case was rendered on December 9, 1913; the appeal was taken on May 13, 1914; the transcript was filed in this court on May 27, 1914, and the cause was submitted on June 26, 1914. The original appellant died on June 13, 1914, after the appeal was taken and before the date of submission. On July 25, 1914, a petition was filed in this court asking to substitute Ruth Osterhaus, widow of Harry W. Osterhaus, and Harry Osterhaus, Jr., his son, his only heirs at law, as appellants. Notice was duly served on appellees for August 8, but the order for substitution was not made and entered of record until December 14, 1914. Appellees now ask to have the appeal dismissed on the ground that the assignment of errors has not been amended to correspond with the order of substitution. There is no claim that the appeal is otherwise irregular or defective. The court has jurisdiction of the subject-matter and by the original notice of appeal acquired jurisdiction of appellees. The failure to formally

amend the assignment of errors to correspond with the order of substitution does not vitiate the appeal nor deprive appellees of any right. The

1. order for substitution in legal effect makes the parties named the appellants, and the appellees were duly notified of the fact and are bound by the record without the formal amendment of the assignment. Such amendment would have been proper practice but failure so to do does not afford ground for dismissing the appeal. As affording some light on the question presented we cite: §§677, 678 Burns 1914, §§636, 637 R. S. 1881; §705 Burns 1914, §663 R. S. 1881; *Bruilett's Creek, etc., Co. v. Pomatto* (1909), 172 Ind. 288, 88 N. E. 606; *Helms v. Cook* (1914), 58 Ind. App. 259, 108 N. E. 147; *City of Decatur v. Eady* (1914), — Ind. App. —, 105 N. E. 590.

Objection is urged to appellant's briefs that under the rules of the court no questions are presented for decision. One of the errors assigned is the overruling of appellant's motion for a new trial. The brief is justly subject to some criticism but evidences a good-faith effort and a substantial compliance with the rules sufficient to present the question arising on the motion for a new trial of the alleged insufficiency of the evidence to sustain the verdict. *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218.

The point is especially urged that there is no evidence to support the allegation of a parol gift of the land to appellees by the decedent, Harry Osterhaus. In support of this contention appellant says there is no proof whatever that Harry Osterhaus ever said to the appellees, or either of them, that he intended to give them the property in question, nor that he ever made any such statement in their presence or hearing, or to any other person

assuming to act as their agent in the matter; that the very basis of any agreement of gift is lacking; that loose declarations of the decedent in casual conversations with disinterested parties that the property belonged to Jacob, or that he intended it for "Jake" and his wife for a home, and similar declarations to or in the hearing of third parties, are insufficient to meet the requirements of the law. Appellant also contends that the evidence is shown to be insufficient because, after appellees had improved the farm and while they were living upon it, an effort was made to borrow money by mortgaging the land, and an error in the description of the property was discovered; that appellees procured a deed from the former owners to correct the mistake and the deed was made to Harry Osterhaus; that the mortgage was afterwards executed for \$550 on January 8, 1913. The evidence does show the foregoing in regard to the deed and mortgage, but it also shows that the deed was never delivered to Harry Osterhaus but was procured by appellees; that it was delivered to the attorney for the company that made the loan, and was placed of record by him and afterwards was procured by him and retained in his possession. The evidence also shows that the note was signed by both Osterhaus and Jacob L. Creviston and that the mortgage was executed by them and by Dena Creviston; that Mr. Osterhaus was not present when the loan was made nor when the money was paid, but signed the papers in Cook County, Illinois, and sent them to appellees; that the money was procured by, and turned over to, appellees. The evidence also tends to show that soon after the land was purchased appellees erected a small house on the land, moved into it and cleared, fenced and ditched the land; that later they built a barn, enlarged the house

and made other permanent improvements on the land; that appellees paid all the taxes on the land and have continuously lived upon it since they took possession of it as aforesaid, though the legal title remained in the name of Harry Osterhaus until his death in February, 1913. The evidence also shows that the decedent, shortly after he bought the land, was asked by one Louis Stuart if he was going to be a farmer and he said, "No"; that the land belonged to Jacob; that he was going back to Chicago; that he might get old some time and "Jake" would "give him a corner to roost in"; also, that he told one John M. Taylor that he intended the thirty acres for "Jake" and his wife for a home; that he did not need a farm but might sometime need a place to stay and expected to stay here with his brother-in-law; that he bought the farm for "Jake" and his wife, and that he wanted a place to stay, if he should get so he could not work, and that he expected to stay there; also, that he inquired about land of Harrison Warpup and said that he wanted to buy a piece of land so his brother-in-law and sister could have a home of their own; that "Jake" was a renter and had been dogged around; that after he bought the thirty acres he told him he had bought it for "Jake". The evidence also tends to show that decedent was about thirty-five years of age when he died, and that he and appellees were at all times on friendly terms; that the land was not cleared when purchased, and that about twenty acres were cleared by appellees; that the buildings placed on the land were worth about \$2,600, and the other improvements were permanent and valuable.

It was agreed by the parties, in substance, that the decedent died intestate on February 3, 1913, leaving as his sole and only heirs at law appellant,

his nephew, and Dena Creviston his sister; that the common source of title claimed by the parties was Uriah Herran, from whom decedent bought the land on January 25, 1908. It is not denied by appellants that a parol gift, or a verbal contract

2. for the sale of land, may be taken out of the operation of the statute of frauds by clear and definite proof of the contract or gift, followed by full possession, use and control of the land. While the parol sale or gift, and the facts relied on to take the case out of the operation of the statute of frauds, must be clearly and definitely estab-

3. lished by satisfactory proof, yet the evidence need not be of any particular kind or class and the ultimate fact of sale or gift, like other material facts, may be inferred from facts and circumstances proven by the evidence, which are sufficient to warrant the court or jury trying the case in inferring such ultimate fact. *Cutsinger v. Ballard* (1888), 115 Ind. 93, 96, 17 N. E. 206; *Yost v. Dunk* (1914), 57 Ind. App. 151, 106 N. E. 644, 645; *Bevington v. Bevington* (1907), 133 Iowa 351, 110 N. W. 840, 9 L. R. A. (N. S.) 508, 513, 12 Ann. Cas. 490; *Flanigan v. Waters* (1896), 57 Kan. 18, 21, 45 Pac. 56.

Where a parol gift of land has been accepted by the donee, and possession has been taken in pursuance of such gift, and permanent and

4. valuable improvements have been made upon the land by the donee, and there are no unperformed obligations or conditions relating thereto resting upon such donee, he is the equitable owner of the land, though the legal title may still be in the donor, and as such equitable owner he may enforce specific performance of an agreement to convey, or may quiet his title to the land. *Horner v. McConnell* (1901), 158 Ind. 280, 284, 63 N. E.

472; *Horner v. Clark* (1901), 27 Ind. App. 6, 9, 60 N. E. 732; *Starkey v. Starkey* (1894), 136 Ind. 349, 355, 36 N. E. 287; *Puterbaugh v. Puterbaugh* (1892), 131 Ind. 288, 291, 30 N. E. 519, 15 L. R. A. 341; *Drum v. Stevens* (1884), 94 Ind. 181, 183; *Barnes v. Union School Tp.* (1883), 91 Ind. 301, 304; *Burns v. Fox* (1888), 113 Ind. 205, 207, 14 N. E. 541.

In *Horner v. McConnell*, *supra*, our Supreme Court says: "Equity protects a parol gift of lands equally as it does a parol agreement or contract to sell, provided such agreement is accompanied by possession thereunder, and the further fact appearing that the donee, induced by the promise or agreement of the donor to give, has made valuable and lasting improvements on the premises." In this case the fact of appellees' possession is not disputed. Neither is the fact that valuable

5. improvements were made by appellees, although there is some controversy about who paid for them. There is evidence tending to support appellees' contention on the point and this is sufficient here, though there may be conflicting testimony. The evidence tends to show that the decedent said he intended to buy a farm for appellees and after he bought it, and they were in possession of it, he said it was their farm. These and the other facts and circumstances shown by the evidence were sufficient to warrant the jury in inferring the fact of an absolute gift to appellees.

The evidence sustains the verdict. No intervening error has been presented which warrants a reversal of the judgment. The case seems to have been fairly tried and a correct result reached.

Judgment affirmed.

NOTE.—Reported in 111 N. E. 634. Specific performance, right to, as established by part performance, 53 Am. Dec. 539, 541; 36 Cyc 653, 681. Parol gift of real estate, evidence necessary to establish, 9 L. R. A. (N. S.) 508; 20 Cyc 1222; 21 Ann. Cas. 289.

NEW YORK, CHICAGO & ST. LOUIS RAILROAD
COMPANY v. ALLEN.

[No. 9,048. Filed June 9, 1916.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Liability.—Negligence.—Burden of Proof.*—To invoke the Employers Liability Act (§8020a et seq. Burns 1914, Acts 1911 p. 145), which removes the assumption of risk where injury results from obedience to an order of a superior, the injured person must first prove the specific acts of negligence charged. p. 393.
2. MASTER AND SERVANT.—*Injury to Servant.—Theory of Complaint.—Burden of Proof.*—Where the complaint charges that the injury complained of resulted from the incompetency of a fellow servant, the burden is on the plaintiff to support such theory by some competent evidence, since there can be a recovery only on the theory of the complaint. p. 393.
3. MASTER AND SERVANT.—*Injuries to Servant.—Negligence.—Evidence.*—In an action predicated on injury received because of the incompetency of a fellow servant, a spiker in a gang of track-layers, the evidence is insufficient to show either that the spiker, who struck plaintiff with a sledge, was negligent, or that he was incompetent, thus charging the employer, where it appears that at the time of the accident plaintiff could have seen the danger of his situation, if any, had he looked, and that the spiker was performing his duties in the usual and proper manner. p. 395.
4. MASTER AND SERVANT.—*Injuries to Servant.—Negligence.—Evidence.*—There is a failure of evidence to show that a master placed his employees, including the complaining servant, in a dangerous place to work where it appeared that the foreman had placed two gangs of rail spikers at work at a safe distance apart and that the two gangs had, at the time plaintiff was struck with a sledge, gradually come so close together, without orders so to do and without the knowledge of the master, that it was possible for the accident to occur. p. 395.
5. NEW TRIAL.—*Motion for.—Grounds.—Evidence.*—In an action for damages for personal injuries, where the undisputed facts of the case fail to support the negligence charged, but show that the injury complained of was due solely to an accident, the evidence does not support a verdict for the plaintiff and such verdict is contrary to law, and a motion for a new trial should be sustained. p. 395.
6. TRIAL.—*Instructions.—Conformity to Evidence.*—Instructions are erroneous which authorize a recovery on theories not supported by the evidence. p. 396.

From Allen Circuit Court; John W. Eggeman,
Judge.

Action by Robert Allen against the New York, Chicago & St. Louis Railroad Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Walter Olds, for appellant.

Lee J. Hartzell and *Ray McAdams*, for appellee.

IBACH, J.—The complaint in this case charges substantially the following: On May 15, 1913, appellee was working for appellant on its railroad, under the direction of one of its foremen. He was directed by such foreman to assist in spiking rails to ties on the roadbed. The foreman directed the men engaged in that service to work in two gangs. The first gang, or section, was to spike every third tie and the second section was to follow and spike every third tie. The foreman placed in charge of the first section an Italian laborer who did not understand the work and was awkward and careless in the performance of his work, and appellee was working next to him. "Said laborer stepped back and while in the act of swinging a sledge hammer, swung such hammer in such a manner and carelessly and negligently struck the plaintiff in the eye severely injuring him * * * and said injury was without any negligence on the part of this plaintiff and wholly from the fault and negligence in placing an unskilled laborer to work upon said road and that by reason thereof plaintiff has been damaged in the sum of \$5,000."

There was judgment for appellee on the verdict of the jury for \$222.50. One of the alleged errors is the overruling of appellant's motion for a new trial, one ground of which is that the verdict is not sustained by sufficient evidence. It is apparent, we think, that the action is brought upon the theory that appellant was negligent in the employ-

ment of an incompetent servant, and in requiring appellee to work in close proximity to him, and that appellee's injury was due to the incompetency of such coemployee. The record discloses that the trial court and appellee proceeded during the trial upon this theory. While it is apparent

1. also that appellee's complaint seeks to count upon the Employers' Liability Act of March 2, 1911 (Acts 1911 p. 145, §8020a *et seq.* Burns 1914) one section of which removes the assumption of the risk, "where the injury complained of resulted from the employee's obedience" to an order or direction of the employer or of any employee to whose order or direction he was under obligation to conform or obey, still the burden rests upon the injured person in the first instance to sustain the specific acts of negligence charged before the above statute can be invoked. There is no rule
2. of law better settled than that the plaintiff can only recover on the theory of the complaint, and that the burden is on him to support such theory by some competent testimony. Consequently, in this case it was incumbent on appellee to show that the accident happened in consequence of the incompetency of the fellow servant. Therefore, the first question is whether the evidence supports appellee's theory.

The undisputed evidence shows that at the time appellee received his injury appellant's servants were engaged in laying ties and spiking rails thereon, and that they had laid a portion of the track in the forenoon of that day and had temporarily spiked it so that trains might run safely over it; that they had permanently spiked the north rail, and the foreman had set two gangs, consisting of three men each, to spiking the south rail; that they used a gauge to obtain the correct distance between the

rails, which as the work progressed, was moved forward by the spiker working between the rails. In each of these gangs there was a man called a "nipper", who worked a little in advance of the spikers and carried the spikes, and used a crowbar to pry the ties up to the rails; and then the spikers on each side of the rail drove the spikes, at the same time drawing the rail in position. Each man understood the work and how it was to be done, and they were all in plain view of each other. These two gangs of men were set to work at a distance of thirty-two feet, or one rail's length, from each other, and each gang was to spike every third tie. Appellee was the "nipper" in the rear gang, and when he was sent to that work by the foreman, with instructions substantially as shown by the evidence above given, the foreman left them and went about his other duties some distance from them. The men that were set to work in the rear gang during the absence of the foreman advanced upon the forward gang, which was also moving eastward, until they came up close behind the forward gang. The forward gang was working in plain view of the rear gang. Appellee himself testified: "I knew the men were working ahead of us, but I did not know how far. It was a light day, and I didn't pay any attention to their working at all. I knew they worked ahead. I knew we were coming pretty close. When I stepped up to nip the tie this man was noticed by me and I knew how they swing the hammer to strike. I can't say where they were when I looked." The evidence also shows that in spiking the spiker took the spike, bent over and hit it a tap to set it, then straightened up, stepped one foot back, whirled the hammer around to the side and over his shoulder, and struck the spike. Appellant contends that some spikers lifted their sledges up

and brought them down from that position against the spike. Possibly that is one way that the work might be done, but the evidence here fully discloses the fact that the manner of using the hammer employed by the servant, first above described, was the usual and effective way of driving spikes by spike drivers on railroads. There is abso-

3. lutely no evidence that tends to show that the servant, who was using the sledge which struck appellee, was incompetent and known to be incompetent by appellant, either at the time of employment or afterwards, or that such employee was negligent. This is fatal to appellee's cause of action. See *Spencer v. Ohio, etc., R. Co.* (1892), 130 Ind. 181, 184, 29 N. E. 915; *Brazil, etc., Co. v. Cain* (1884), 98 Ind. 282.

Neither is there any evidence to show that appellant's foreman placed the employes, including appellee, in a place of danger to perform

4. their labor. On the contrary, it shows that they were sent to work at a safe distance apart, with no order to go any nearer at any

5. time, and there is no evidence from which it might be said that appellant knew that they were working closer than when the work began, until the accident occurred. We believe the undisputed facts of the case do not support the negligence charged in the complaint, but they do show that appellee's injury was due solely to an accident, for which appellant was in no wise responsible. This being true, the evidence does not support the verdict; the verdict is contrary to law, and for these reasons alone, the motion for a new trial should have been sustained. *Nave v. Flack* (1883), 90 Ind. 205, 46 Am. Rep. 205; *Conner v. Citizens Street R. Co.* (1896), 146 Ind. 430, 45 N. E. 662; *Standard Pot-*

tery Co. v. Moudy (1904), 35 Ind. App. 427, 435 73 N. E. 188; 29 Cyc 852 and cases cited.

Moreover, the case was put to the jury by the court on instructions authorizing a recovery on theories not supported by the evidence.

6. This also was error. Instructions must be pertinent to the issues presented by the pleadings and evidence. 11 Enc. Pl. and Pr. 164; *Lindley v. Sullivan* (1893), 133 Ind. 588, 32 N. E. 738, 33 N. E. 361.

It is therefore ordered that the judgment of the court below be and the same is reversed at appellee's cost, and the case is remanded with instructions to the court below to sustain appellant's motion for new trial and for further proceedings in accordance with this opinion.

NOTE.—Reported in 113 N. E. 315. See under (1) 26 Cyc 1404, 1407, 1418; (3), (4) 26 Cyc 1142, 1452. See also Ann. Cas. 1912C 96.

FITES v. FITES.

[No. 9,000. Filed March 29, 1916. Rehearing denied June 9, 1916.]

1. DIVORCE.—*Alimony.—Adultery of Wife.—Effect.*—While it is true that alimony will not generally be awarded the wife where divorce is granted the husband on the ground that she has been guilty of promiscuous adultery, yet §1083 Burns 1914, §1045 R. S. 1881, vests the court with sufficient authority to award alimony in such a case where it appears that the wife has been instrumental in accumulating the property possessed by the husband. p. 397.
2. DIVORCE.—*Attorney Fees.—When Allowable.—Statute.*—The power to award fees to the wife's attorneys in an action for divorce coming to the court solely by statutory authority, there must be, in making such allowances, strict adherence to the terms of the statute (§1080 Burns 1914, §1042 R. S. 1881) which, while permitting the award of fees to the wife's attorneys during the pendency of the petition for divorce does not authorize such an allowance to be made primarily as a part of the final judgment. p. 398.

From St. Joseph Superior Court; *Vernon Van Fleet*, Judge.

Action by Edward Fites against Nancy Fites. Judgment for plaintiff in part, and from an order overruling his motion to modify the judgment the plaintiff appeals. *Reversed.*

Charles Weidler, Orie Parker and Samuel Petten-gill, for appellant.

Guy N. Bever, Rodney H. Bayless and Clifford V. DuComb, for appellee.

IBACH, C. J.—In this case the court granted a divorce to appellant on the grounds “alleged in his complaint.” The grounds pleaded are “adultery with one Mike McClanahan and divers other men”, habitual drunkenness and cruel treatment. On granting the divorce the court decreed appellee \$350 alimony, and the further sum of \$175 for attorneys’ fees. Appellant is here contending that the trial court erred in overruling his motion to modify the judgment on the ground that alimony can not be decreed where a divorce is granted to the husband because of the adulterous conduct of the wife.

While authority is given the trial court generally to award alimony (§1083 Burns 1914, §1045 R. S. 1881), yet in almost every instance where the wife has yielded her person to promiscuous inter-

1. course with other men, and the divorce has been granted to the husband on that ground, the higher courts have set aside an award of alimony to her, if such was granted by the trial court. The case which clearly lays down this rule is *Spaulding v. Spaulding* (1892), 133 Ind. 122, 32 N. E. 224, 36 Am. St. 534. See also *Drollinger v. Drollinger* (1914), 57 Ind. App. 115, 106 N. E. 428, and cases there cited. The courts, however, have recognized an exception to this general rule, where the wife’s industry has aided in accumulating the

property possessed by the husband, and it is also held to be contrary to public policy to leave a wife destitute, even though adulterous. *Conner v. Conner* (1867), 29 Ind. 48; *Fivecoat v. Fivecoat* (1871), 32 Iowa 198.

While the evidence is not before us, appellant in his motion to modify admits that appellee's evidence tended to show that she had contributed to her husband's property. From this, together with the presumption which we are permitted to indulge in support of the judgment, we are justified in holding that this case forms an exception to the general rule and the court did not err in adjudging the alimony to appellee.

Appellant also insists that it was error for the court to award judgment against him for appellee's attorneys' fees. The power to award fees

2. for services rendered by attorneys for the wife, in connection with divorce cases, is not a power inherent in the common law, but comes to the trial court solely by virtue of the statute and, before any order with respect thereto will be upheld, it must appear that the provisions of the statute have been followed. Section 1080 Burns 1914, §1042 R. S. 1881, authorizes the court "pending a petition for divorce" to make such orders "relative to the expense of such suit as will insure to the wife an efficient preparation for her case," etc., and "on decreeing a divorce in favor of the wife or refusing one on the application of the husband," the court may require the husband to pay the reasonable expenses of the wife in the prosecution or defense of her action. In the case at bar, no order of the court of the character contemplated by the foregoing section of the statute was made until the final decree was entered. The decree was not in favor of appellee, the wife, but was for

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

appellant, the husband; so that, while the statute requires the payment of money to the wife for attorneys' fees and expenses during the pendency of the suit, when such order as is contemplated by the statute is made, it does not authorize such a decree as a part of the final judgment in this case. *McCullough v. Robinson* (1851), 2 Ind. 630; *Davis v. Davis* (1895), 141 Ind. 367, 40 N. E. 803; *McCue v. McCue* (1897), 149 Ind. 466, 49 N. E. 382; *Newman v. Newman* (1873), 69 Ill. 167; *Lacey v. Lacey* (1895), 108 Cal. 45, 40 Pac. 1056; *Wilde v. Wilde* (1866), 2 Nev. 306; *Johnson v. Johnson* (1896), 57 Kan. 343, 46 Pac. 700.

The court erred in allowing attorneys' fees to appellee and for this error the judgment is reversed, with directions to the trial court to modify the judgment in accordance with this opinion.

NOTE.—Reported in 112 N. E. 39. Wife's right to alimony on the granting of an absolute divorce to husband, 20 L. R. A. (N. S.) 421; 30 L. R. A. (N. S.) 73; 20 Ann. Cas. 24; Ann. Cas. 1915C 1252; 14 Cyc 767, 102 Am. St. 700. Liability of husband for services of wife, 24 L. R. A. 629.

TERRE HAUTE, INDIANAPOLIS & EASTERN TRAC-
TION COMPANY v. HUNTER.

[No. 8,743. Filed January 28, 1916. Rehearing denied April 18, 1916. Transfer denied June 9, 1916.]

1. CARRIERS.—*Carriage of Passenger.—Duty of Carrier.*—Where it appears that a passenger on an interurban car notified the conductor that he wished to alight at stop 32, but, because of the negligence of the conductor, he was carried to stop 34, with the surroundings of which he was unacquainted, and was then told that he had reached his destination and directed to alight, and was killed while attempting to walk back along the tracks to stop 32, the relation of carrier and passenger, under such circumstances, did not terminate with the departure from the car, as the carrier owed the passenger the duty of using a reasonable degree of care to deliver him safely to his proper destination, since, the relation of carrier and passenger having once been established, it con-

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

- tinues until terminated by the voluntary act of the passenger or by the act of the carrier, under circumstances justifying its termination and such termination was not justified by the act of the railroad in putting off the passenger at the wrong place. p. 406.
2. CARRIERS.—*Carriage of Passengers.—Duty of Carrier.*—At the end of the journey the relation of passenger and carrier continues until the passenger has had a reasonable opportunity to depart from the train or car and the station in safety. p. 406.
3. CARRIERS.—*Carriage of Passengers.—Injury.—Intervening Agency.*—Where a passenger on an interurban car was negligently carried past a stop where, as he had informed the conductor, he wished to be put off the car, and in attempting to reach his original destination, without directions or assistance from the conductor, by walking back along defendant's tracks, was struck and killed by another car, the fact that the decedent elected to walk upon the railroad tracks rather than take another way, can not be held, as a matter of law, to be such an intervening cause as would relieve liability for the original, antecedent negligence, but should be submitted to the jury upon a question of decedent's contributory negligence. p. 413.
4. CARRIERS.—*Carriage of Passengers.—Passenger Carried Beyond Destination.—Duty of Carrier.*—Where a passenger is carried beyond his station to another station, it is the duty of the company to use reasonable care to see that the passenger is delivered at his proper station; and this duty, in the instant case, might have been fulfilled by giving proper directions as to the way to be taken, with instructions as to the dangers likely to be encountered, or by proper arrangements for transportation upon a returning train. p. 414.
5. CARRIERS.—*Carriage of Passengers.—Injury to Passenger.—Intervening Agency.*—Where a passenger on an interurban car was negligently carried past his destination to a stop with the surroundings of which he was totally unacquainted, and was there informed by the conductor that he had arrived at his station and was directed to leave the car, and upon discovering that he had been put off at the wrong point, started walking back along the defendant's tracks toward his original destination and while so doing was struck and killed by another car, the conduct of the decedent in acting as he did under the circumstances cannot, as a matter of law in determining the sufficiency of the complaint, be held to be such an intervening agency as breaks the line of causation and becomes the responsible cause of the injury, thereby relieving the defendant of its antecedent negligence, since the defendant company might reasonably have anticipated that the decedent would act as he did under the circumstances and was bound to know the perils attendant upon such a course of action. p. 415.
6. EVIDENCE.—*Judicial Notice.—Character of Interurban Car.*—The court will take judicial notice of the fact that interurban cars

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

are propelled by electricity and are much more easily stopped and started than steam trains which usually consist of several cars and a heavy engine. p. 416.

7. **NEGLIGENCE.—Proximate Cause.—Concurring Causes.—Liability.**—Where two causes concur in producing an injury, the party at fault for one of such causes will be held liable, if the injury would not have occurred in the absence of his fault and, in the case at bar, where the decedent was killed by a car while walking back along defendant's railroad track toward his station past which he had been negligently carried, the accident would not have occurred had it not been for the original negligence in carrying decedent past his proper destination. p. 417.
8. **TRIAL.—Verdict.—Submission of Interrogatories.—Propriety.—Statute.**—Under §572 Burns 1914, Acts 1897 p. 128, providing that the jury may be required to find specially, by answers to interrogatories, upon particular questions of fact, in an action against an interurban railroad for the death of a passenger negligently carried past his station, and who was killed by another car while attempting to walk back thereto, the interrogatory, "Could the motorman in the exercise of ordinary care have stopped his car and prevented striking plaintiff after he discovered plaintiff on said bridge?", was improperly submitted as its answer calls for a conclusion rather than a fact. p. 417.
9. **APPEAL.—Review.—Answer to Special Interrogatories.**—Where an interrogatory is improperly submitted to the jury its answer cannot be taken into account for any purpose since the appellate court will not consider anything which is improperly in the record in reaching its conclusions. p. 418.
10. **TRIAL.—Verdict.—Issues.**—In an action against an interurban railroad for the death of a passenger killed while attempting to walk back along the tracks to his destination past which he had been negligently carried, where the jury answered negatively an interrogatory as to whether the motorman did all within his power to prevent the accident after discovering decedent on the tracks, the general verdict for the plaintiff could stand as resting on a paragraph of complaint based on the theory of last clear chance. p. 419.
11. **APPEAL.—Briefs.—Presentation of Error.—Review.**—Where the "Points and Authorities" in appellant's brief present no question of conflict between the answers to special interrogatories and the general verdict nor any question as to error in overruling the motion for a new trial, except the giving and refusal of certain instructions, the court will consider no other which might arise under the overruling of the motion. p. 419.
12. **TRIAL.—Action for Injuries.—Instructions.**—An instruction as to what might be considered in determining whether plaintiff's decedent was guilty of any "material" negligence in attempting to

Terre Haute, etc., Traction Co. *v.* Hunter—62 Ind. App. 399.

cross a railroad bridge under the circumstances disclosed by the evidence is not erroneous on the ground that the word "material" left to the jury the question as to what degree, quality or extent of negligence they would regard as material. p. 419.

From Hendricks Circuit Court; *George W. Brill*, Judge.

Action by John W. Hunter against the Terre Haute, Indianapolis and Eastern Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

F. Winter, D. E. Watson, Otis E. Gulley, George C. Harvey and W. H. Latta, for appellant.

W. O. Dunlavy and W. W. Thornton, for appellee.

SHEA, J.—Appellee, in the court below, recovered judgment for \$2,000 for loss of services of his minor son, who was killed by being struck by one of appellant's cars. The cause was originally filed in the Putnam Circuit Court and on a change of venue it was taken to the Hendricks Circuit Court. The errors assigned for a reversal are the overruling of appellant's demurrers to each of the first, second, third and fourth paragraphs of complaint, and the overruling of its motions for judgment on the facts found in answer to interrogatories notwithstanding the general verdict and for a new trial.

The complaint was in four paragraphs, each alleging in substance, the following general facts: That decedent, a boy twelve years old, took passage at Greencastle, Indiana, on appellant's interurban passenger car for stop 32, which was west of Greencastle; that he paid his fare to that point, and informed the conductor of the car of the place where he desired to alight or stop; that the fare was accepted for that place by the conductor, but in violation of the contract and of decedent's request,

he was carried beyond the place of his destination to stop 34, and was put off by the conductor at a stop which he supposed was his destination, and with which he was unfamiliar; that in attempting to return to his destination by the railway track and crossing a creek over and upon appellant's railway bridge, the only way he knew how to cross said creek, he was killed by appellant's car, which came up behind him from the west while he was still upon said railway bridge. The specific negligence charged against appellant in the first paragraph of complaint was the alleged wrongful conduct of the conductor of the west-bound car, upon which decedent was a passenger, in carrying him past stop 32, at which point he should have been permitted to alight from the car, after he in person, and by his mother, Mary E. Hunter, had informed the conductor that he wished to get off said car at stop 32; the carelessness and negligence of appellant's servants in directing decedent to alight from the car at stop 34; the negligence and carelessness of appellant's servants in failing to provide any means of transportation back to stop 32; and the carelessness and negligence of appellant in failing to notify decedent that there would be another car going east in a few minutes. The second paragraph of complaint contains substantially the same charge of negligence, based upon the same theory and facts, with a slight variation in the statement, to the effect that after decedent had taken passage upon said car, and before he had reached stop 32, he informed the conductor, in person, and by his father, John W. Hunter, that he wished to alight and get off said car at that point; that after the car had passed stops 32 and 33, and before it reached a station of appellant called Hutchinson, between stops 33 and 34, the conductor called out stop 32,

but the car was then approaching the station of Hutchinson and had slowed up for the purpose of discharging and taking on passengers, whereupon decedent arose for the purpose of alighting therefrom, but the conductor informed him that it was not his place of alighting and directed him to remain upon the car, which he did; that the car then proceeded west until it arrived at stop 34 on appellant's railway, where it stopped, and the conductor then directed decedent to get off the car, which he did. The third paragraph of complaint is based upon the theory of last clear chance, and charges that decedent was in a perilous position upon said track from which he could not escape, and in which position appellant's motorman saw him and realized his danger in ample time to have stopped his car by the exercise of ordinary care, which the motorman carelessly and negligently failed to do, but permitted the car to strike and injure decedent as charged. The fourth paragraph of complaint differs from the first and second only in that it charges, that at the time decedent was so directed by the conductor to leave the car and at the time he alighted therefrom at stop 34, he believed that he had arrived at stop 32, as he was informed by the conductor that he had arrived there; that after the car had left him, decedent perceived he was not at stop 32 and for the first time ascertained that he was at stop 34, so that the legal effect of the first, second and fourth paragraphs of complaint is not essentially different.

It is argued that the demurrer should have been sustained to the first, second and fourth paragraphs of complaint. In considering this question these paragraphs may be considered together. The objections thereto are identical and substantially as follows: That they do not sufficiently state facts

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

showing: (1) That appellant violated, imperfectly performed or omitted to perform any duty it owed appellee, which would constitute actionable conduct on its part and make it liable for the injuries complained of; (2) that the acts on the part of appellant complained of, were negligently, willfully, or otherwise wrongfully performed or omitted by it; (3) that the conduct upon the part of appellant which would amount in all to negligence, willfulness, or other wrongful conduct which would be actionable on its part; (4) that the alleged injuries and damage were approximately caused by any act or omission on the part of appellant which was negligent, willful or otherwise wrongful, and for which it would be liable under the allegations of said paragraphs of complaint. In support of its contention appellant argues that the damages sued for are not the proximate result of the alleged negligent act, because the conductor of the west-bound car was not obliged to anticipate and guard against the accident in question, and therefore was not negligent in respect to it; that the duty of the conductor does not extend so far, even in the exercise of the highest degree of care; that "the facts pleaded show the intervention of three independent agencies, after the act complained of had wholly spent its force: (1) The act of the appellee himself in deciding what route he would take in returning, and in putting his decision into execution; (2) the actions of the decedent in undertaking to remain upon the track to signal the oncoming east-bound car until it was too late to get out of the way; (3) the arrival and movements of the east-bound car"; that "under the doctrine of last clear chance, the appellee knew of the act of the conductor in carrying him and his family past his station (the act complained of) and could have avoided the results

thereof. His act is therefore the sole operating cause."

We will first proceed to consider the question of what duty, if any, appellant owed to decedent after its conceded negligence in carrying him past the station at which he should have been permitted to alight. It is argued on behalf of appellant that it owed appellee's decedent no duty as a passenger after he alighted and departed safely from stop 34, a proper station on appellant's road. Upon this proposition there is much citation of authority and in some jurisdictions appellant's theory is sustained, but after a careful examination of all the authorities, especially those within our own State, it is the judgment of this court that appellant owed

1. appellee's decedent the duty of using a reasonable degree of care to deliver him safely at the point of his destination; that is to say, appellant owed him this duty as a passenger until he arrived safely at stop 32. When the relation of carrier and passenger is once established, it continues until terminated by the voluntary act of the passenger or by the act of the carrier, under circumstances justifying its termination, and extends to the arrival of the passenger at his destination. It can not be said that the act of decedent in this case voluntarily terminated the relation because he was put off at a wrong stop, without his knowledge or consent, and where he was unacquainted with the surroundings. At the end of the journey

2. the relation of passenger and carrier continues until he has had a reasonable opportunity to depart from the train or car and the station in safety. 6 Cyc 541.

The case of *New York, etc., R. Co. v. Doane* (1888), 115 Ind. 435, 17 N. E. 913, 1 L. R. A. 157, 7 Am. St 451, is an interesting case, and seems to be de-

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

cisive of the question here presented. Briefly stated, the facts are, that appellee Doane was a passenger riding in a caboose attached to a freight train, which, upon arrival at her destination, did not pull up to the platform. Appellee, relying upon the statement of a fellow passenger and believing that the caboose would be stopped at the station, did not alight therefrom. The caboose was not stopped at the station. After some little time the conductor discovered that appellee had not alighted and the train was stopped, the caboose being at a point eighty to ninety rods beyond the station. Appellee requested the conductor to take the train to the station platform, which he refused to do, and upon the conductor's request she alighted with his assistance. Appellee was unacquainted with the locality, followed some direction given by the conductor and started to walk back to the station upon the railway track as the best route for her to take. In attempting to cross a cattle pit, on the way to the station, she fell and broke her arm and was otherwise injured. There were gates upon the side of the right of way through which she might have entered the premises adjoining and gone to the station without walking upon the railway track, but she had no knowledge that she might do so, and nothing occurred to direct her attention to any other route than the railway track. The court held that appellee was justified in not getting off at the place where the caboose first stopped; that the railway company failed to perform a plain and urgent duty in not backing its train to the station after she was discovered on the caboose, or in not giving her such assistance and instructions as would insure her safe return to the station after it had carried her beyond her destination; that the duty of a railroad company as a common carrier

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

of passengers is not fully performed until it delivers its passengers safely at the station to which they have paid their fares. The court also held that appellee was not guilty of contributory negligence in failing to discover the gates leading into the private enclosures nor was she guilty of contributory negligence in her effort to walk over the cattle pit, as a matter of law. See, also, *Kentucky, etc., R. Co. v. Buckler* (1907), 125 Ky. 24, 100 S. W. 328, 8 L. R. A. (N. S.) 555, 128 Am. St. 234; *Alabama, etc., R. Co. v. Cox* (1911), 173 Ala. 629, 55 South. 909; *Louisville, etc., Co. v. Nolan* (1893), 135 Ind. 60, 34 N. E. 710; *Indiana Union Traction Co. v. Keiter* (1911), 175 Ind. 268, 275, 92 N. E. 982; *White Water R. Co. v. Butler* (1887), 112 Ind. 598, 14 N. E. 599; *Evansville, etc., R. Co. v. Kyte* (1893), 6 Ind. App. 52, 32 N. E. 1134; *Pittsburgh, etc., R. Co. v. Rose* (1907), 40 Ind. App. 240, 250, 79 N. E. 1094, 81 N. E. 1179; *Olson v. Chicago, etc., R. Co.* (1905), 94 Minn. 241, 102 N. W. 449; *Terre Haute, etc., R. Co. v. Buck* (1884), 96 Ind. 346, 49 Am. Rep. 168; *Texas, etc., R. Co. v. Bigger* (1915), 239 U. S. 330, 36 Sup. Ct. 127, 60 L. Ed. 127; *Reimard v. Bloomsburg, etc., R. Co.* (1910), 228 Pa. 384, 77 Atl. 560, 61 Am. & Eng. R. Cas. 10; *Georgia, etc., R. Co. v. McAllister* (1906), 126 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177; *Adams v. Missouri, etc., R. Co.* (1890), 100 Mo. 555, 12 S. W. 637, 13 S. W. 509; *Birmingham, etc., R. Co. v. Seaborn* (1910), 168 Ala. 658, 53 South. 241; *Ham v. Delaware, etc., R. Co.* (1893), 155 Pa. St. 548, 26 Atl. 757, 20 L. R. A. 682; *Kentucky, etc., R. Co. v. Biddle* (1896), 17 Ky. L. R. 1363, 34 S. W. 905.

In the latter case, plaintiffs were carried three miles beyond their station to a proper station on the line of defendant's road, where they alighted from the train. The conductor made an effort to

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

secure a conveyance for them to return, but failed to do so. Injuries resulting from their attempt to walk back along the railroad track were held to be the proximate result of the failure to stop at the station to which they had purchased tickets. In the case of *Reimard v. Bloomsburg, etc., R. Co.*, *supra*, the railroad company was held liable where plaintiff was put off at a proper station beyond her point of destination, and in walking back over the company's tracks and right of way she was injured. It was held that the railroad company ought to have reasonably anticipated that plaintiff would do just what she did, and that its negligence was therefore the proximate cause of the injury.

It is next argued that there is no actionable wrong charged against appellant in the complaint because the declarations that the negligence of appellant in carrying appellee's decedent beyond his destination to stop 34 was not the proximate cause of the injuries, for the reason that there were intervening agencies which broke the causal connection between the antecedent negligence and subsequent injury, as above stated. Very many definitions growing out of the circumstances of the particular case being considered are given, both by the law writers and the decided cases. We shall proceed to examine a few of these authorities.

In the case of *Lake Erie, etc., R. Co. v. Charman* (1903), 161 Ind. 95, 103, 67 N. E. 923, the Supreme Court has defined proximate cause as follows: "And that cause will be held proximate which is shown to be active, operative, and continuing, and the probable and natural source of the injury; that is to say, where the sequence or injury complained of under the circumstances surrounding the case is such as might and ought to have been foreseen by a person of ordinary sagacity as a

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

probable result of the thing done, it will be deemed the responsible or proximate cause." On the question of "proximate cause," in the case of *Cleveland, etc., R. Co. v. Powers* (1909), 173 Ind. 105, 118, 88 N. E. 1073, 89 N. E. 485, the court uses this language: "What is proximate cause and what is essential to show it? 'One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable.' *Stone v. Boston, etc., R. Co.* (1898), 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794. * * * 'The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances attending it. * * * The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation?' *Milwaukee, etc., R. Co. v. Kellogg* (1876), 94 U. S. 469, 24 L. Ed. 256. 'If an efficient and adequate cause is shown, it may be considered as the real or proximate cause, unless another, not incidental to it, but independent thereof, appears to have intervened and caused the accident or injury in controversy.' (Authorities). 'The proximate cause of an accident or injury is sometimes described as the immediate cause, the nearest cause, the actual or direct cause, or the efficient cause.' *Indianapolis St. R. Co. v. Schmidt, supra*. 'The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation.' *Aetna Ins. Co. v. Boon* (1877), 95 U. S. 117, 24 L. Ed. 395. * * * 'The

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

proximate cause of an injury may in general be stated to be * * * an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter.' 6 Words and Phrases 5759. "The term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's derelictions and the loss.' 6 Words and Phrases 5758. "When two causes unite to produce the loss, the question that remains is, Which was the proximate cause?" *Blythe v. Denver, etc., R. Co.* (1890), 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. 403." In the case of *Balzer v. Waring* (1911), 176 Ind. 585, 593, 95 N. E. 257, 48 L. R. A. (N. S.), 834, this definition is found: "Proximate cause is the act that immediately causes, or fails to prevent, an injury that might reasonably have been anticipated would result from the negligent act or omission charged, and without which such injury would not have occurred. The test is to be found in the probable injurious consequences that were to be anticipated, and not in the number of subsequent events or agencies that might arise to bring about such consequences. *Evansville Hoop, etc., Co. v. Bailey, supra*, and authorities cited." In the case of *Cincinnati, etc., R. Co. v. Acrea* (1908), 42 Ind. App. 127, 133, 82 N. E. 1009, this language is used: "In determining proximate cause, the inquiry is directed to the responsible cause, without reference to whether it is the first or last in the succession of events that resulted in the plaintiff's injury. *Lake Erie, etc., R. Co. v. Charman* (1903), 161 Ind. 95.

Proximate cause has been further defined to be the efficient cause, one that necessarily sets the other causes in operation. *Pennsylvania Co. v.*

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

Congdon (1893), 134 Ind. 226, 230, 39 Am. St. 251." The court in the case of *Cumberland Tel., etc., Co. v. Kranz* (1911), 48 Ind. App. 67, 74, 95 N. E. 371, 374 said: "The proximate cause of an injury is the responsible cause, the cause which is the active, operative, continuing and natural source of the injury. . * * * The proximate cause of an injury is the moving cause—the cause without which the injury would not have occurred, although subsequent events or agencies may have helped to bring about the result. The real test of what is a proximate cause, when there are intervening agencies, is whether the result is such as might reasonably have been expected as the consequence of the original negligence, and if it is such, the liability continues in spite of an intervening cause or causes." In the case of *Peru Heating Co. v. Lenhart* (1911), 48 Ind. App. 319, 329, 95 N. E. 680, this definition is given: "The proximate cause is ascertained by determining the responsible cause, without regard to its time or place in the succession of events that resulted in the injury. (Authorities.)

"If the original wrongful act or omission supplied the condition by which the subsequent act was rendered hurtful, he who committed that act is responsible. (Authorities)"

A definition often cited and referred to is that given by the court in the case of *Milwaukee & St. Paul, etc., R. Co. v. Kellogg* (1876), 94 U. S. 469, 24 L. Ed. 256: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, * * * " The following definition is taken from *Shippers, etc., Co. v.*

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

Davidson (1904), 35 Tex. Civ. App. 558, 80 S. W. 1032, and is quoted with approval in Thompson on Negligence; White's Supplement §48: "The proximate cause is not necessarily the one nearest to the event, but the primary cause may be the one proximately responsible for the result although it may operate through one or more successive instruments. If the primary cause was so linked and bound to the events succeeding it that all together they create and become one continuous whole, the one event so operating upon the other as to tie the result to the primary cause, the latter will be the proximate cause of the injury."

Applying these principles to the averments of the complaint, may we conclude that the negligence of appellant in carrying decedent beyond his stop and in failing to safely deliver him at his destination was the proximate cause of the injury, or must we conclude that there were intervening forces which broke the causal connection between such antecedent negligence and the subsequent injury? Under the holding in the case of *New York, etc., R. Co. v. Doane, supra*, we think the fact that decedent, as well as his father, elected to

3. walk upon the railroad track rather than take another way, can not be held an intervening cause, as a matter of law, but should be submitted to the jury upon the question of decedent's contributory negligence. *Alabama, etc., R. Co. v. Cox, supra*.

It is argued that in the *Doane* case the passenger was carried beyond the station platform and was required to alight at a place where there was no station or platform, and therefore a different rule should apply in this case, because the decedent alighted from the train at a proper stop or station. It is undisputed that the passenger in neither case

was injured in alighting from the train at the place at which the train stopped, but in both instances the injury occurred while the passenger was attempting to return along the track to the point of destination where he should have been permitted to alight, so we conclude that the same principle should apply in the instant case as was invoked in the Doane case. It is also argued that there is a broad distinction between cases in which passengers are let off at a station platform and at a point not a station platform upon the right of way. It is insisted that no courts have held that, where a passenger has been carried past his destination to a station beyond, he has a right to the possession of the tracks and right of way of the company so carrying him until he has sufficient time to return to his destination; that if "such were true, the railroad company must, after carrying one beyond his station to another station operate its trains with reference to the right of the person so carried past his station to use and occupy its railroad tracks and right of way." We need not go to the extent

indicated by counsel, but we do believe it to

4. be the true rule that, where a passenger is carried beyond his station to another station, it is the duty of the company to use reasonable care to see that the passenger is delivered at his proper station. This may be done by proper direction as to the way to be taken, with instructions as to the dangers likely to be encountered, or by proper arrangements for transportation upon a returning train, which could very well have been done in this instance, as the averments of the complaint disclose. *Adams v. Missouri, etc., R. Co., supra*; *Hutchinson, Carriers* (3d ed.) §1126; *New York, etc., R. Co. v. Doane, supra*; *Birmingham, etc., R.*

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

Co. v. Seaborn, supra; Alabama, etc., R. Co. v. Cox, supra.

As to whether decedent was guilty of contributory negligence in failing to get off the track before being struck, thus furnishing the intervening cause of the injury, can not be declared as a matter of law in determining the sufficiency of the complaint, in view of its averments. An intervening agency, which will relieve a party of antecedent negligence and which breaks the line of causation and becomes the responsible cause of the injury, must have been such an one as might not have been reasonably anticipated under all the circumstances. It is the judgment of this court that the intervening circumstances in this case, which are urged by ap-

5. pellant as being sufficient to break the line of causation, or similar circumstances, might reasonably have been anticipated, and therefore, can not relieve appellant of its original negligence, from the viewpoint from which we are now considering the case, namely, the sufficiency of the three paragraphs of complaint. Appellant's conductor knew that decedent was put off the train at the wrong station and in a sparsely settled community with only one house in sight which was some distance away; that he would very likely follow the railroad track back to his destination, as being the most direct and convenient way; that there was a long trestle which he would be obliged to cross in so doing; that there was a car upon its track approaching near at hand and in the same direction; that said car would overtake decedent while on his way to said station, and, in the ordinary course of events, might reach decedent while he was upon said trestle. Under such circumstances appellant failed to give any directions as to the way to be taken back to station 32; failed

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

to give any notice as to the approaching train which struck decedent; failed to notify the conductor of the passing car of the fact that he had carried decedent beyond his station 32 to station 34; and failed to make any provisions for his safe return thereto. It must be borne in mind in this

connection that this was an electric inter-urban railroad; that the cars or trains usually consist of only one car. The court may take judicial notice of the fact that such cars are propelled by electricity and are much more easily stopped and started than steam trains, which usually consist of several cars with heavy locomotive engine attached. If this had been a heavy steam train instead of a light, one-car, electric interurban, it could be argued with more force that appellant could not back its car to the point of decedent's destination, or could not stop its cars at a meeting point for a sufficient length of time to inform the conductor of the passing car, which ran over decedent in this case, of the exact situation and of the danger to decedent. Courts are obliged to take all these circumstances into account when it is argued, as in this case, that railroad companies can not interrupt their regular schedules to properly deliver passengers at their destination. *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 97 N. E. 822; *Chicago, etc., R. Co. v. Mitchell* (1914), 56 Ind. App. 354, 105 N. E. 396; *Terre Haute, etc., R. Co. v. Buck, supra*; *Alabama, etc., R. Co. v. Cox, supra*. It has been recently held by this court that the intervention of an independent agency does not break the line of causation so as to relieve the original wrongdoer in cases where, by the exercise of ordinary prudence, the original wrongdoer should have foreseen such intervening cause and guarded against the danger likely to result therefrom. *Cleveland, etc., R. Co. v. Clark, supra*.

Where two causes concur in producing the injury, the party at fault for one of such causes will be held liable, if the injury would not

7. have occurred in the absence of such fault.

Belt Railroad, etc., Co. v. McClain (1914), 58 Ind. App. 171, 106 N. E. 742. It can be said in the instant case that the injury to decedent would not have occurred in the manner charged in the complaint, if appellant had not carried him past his stop, which act upon the part of appellant is concededly negligent.

It is not argued that the third paragraph of complaint is obnoxious to a demurrer, but it is argued that the answer of the jury to interrogatory No. 12 conclusively shows that the recovery was not based upon the doctrine of last clear chance, upon which this paragraph is grounded. The interrogatory and answer thereto are as follows: "Could the motorman in the exercise of ordinary care have stopped his car and prevented striking plaintiff after he discovered plaintiff on said bridge? Answer: No." In determining the effect of this interrogatory as presented in this connection, we are confronted with the question as to whether it was such an one as under the rule could properly be submitted to a jury. If it could not, may we take the answer thereto into account for any purpose in the consideration of the issues here involved? Section 572 Burns 1914, Acts 1897 p. 128,

by virtue of which interrogatories are author-

8. ized to be submitted to a jury, provides that the jury may be required to find specially "upon particular questions of fact." It has been repeatedly held that an interrogatory which calls for a conclusion is improper. *Pennsylvania Co. v. Reesor* (1915), 60 Ind. App. 636, 108 N. E. 983;

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

Tippecanoe, etc., Co. v. Jester (1913), 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E 721; *Marietta, etc., Co. v. Pruitt* (1913), 180 Ind. 434, 102 N. E. 369; *Lake Erie, etc., R. Co. v. Reed* (1914), 57 Ind. App. 65, 103 N. E. 127.

It is clear under the rule as announced that the interrogatory was improperly submitted, as it calls for a conclusion rather than a question of fact. Appellant's learned counsel does not argue that this interrogatory was properly submitted, but insists that the answer thereto shows conclusively

9. that the jury did not rest its verdict upon the third paragraph of complaint as above stated, and should be considered in that connection. If, as we have decided, said interrogatory was not a proper one to be submitted to the jury under the law, and could not be taken into account in determining whether there was a conflict between the facts specially found and the general verdict, we are of the opinion that said interrogatory could not be taken into account for any purpose. We have searched diligently for authority upon this point, but have found nothing bearing directly upon the question, and we reach our conclusion herein by applying the general principle that this court shall not consider anything which is improperly in the record in reaching its conclusions. We therefore conclude that the jury might have rested its verdict upon the paragraph of complaint which is based upon the doctrine of last clear chance. It will be observed also that this interrogatory uses the word "plaintiff" instead of "decedent." Query—whether it is entitled to any consideration for this reason?

Interrogatory No. 15 and the answer thereto read as follows: "Did the motorman do all within his power to prevent said accident after he discovered plaintiff and his said son upon the bridge?

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

Answer: No.” In view of this situation, we conclude that the verdict of the jury might very well have rested on the third paragraph of

10. complaint, which presents the theory of last clear chance. *Watts v. Chicago, etc., R. Co.* (1914), 61 Ind. App. 51, 104 N. E. 42.

No question of conflict between the facts found in answer to interrogatories and the general verdict is presented in appellant’s “Points and

11. Authorities” nor is any question presented in its “Points and Authorities” upon any error of the court in overruling the motion for a new trial, except the giving of instructions Nos. 6, 12, 13, 14, 15 and 21 on its own motion and the refusal to give appellant’s instructions Nos. 2 and 5. We therefore give no consideration to any other questions which might arise thereunder. The general verdict finds that appellant was guilty of negligence which was the proximate cause of decedent’s injury and death, and that decedent was free from contributory negligence. No question is presented which will warrant this court in reviewing the findings thus made by the general verdict.

Instruction No. 6 given by the court on its own motion is objected to. It told the jury that if any one paragraph of the complaint was proven by a preponderance of the evidence, appellee was entitled to recover. It is argued that at least one of said paragraphs did not state a cause of action and for that reason the instruction was erroneous. Inasmuch as we have held that all paragraphs of complaint stated a cause of action, the objection is not well taken. It is argued that the court erred in giving to the jury the fifteenth instruction

12. because by the use of the word “material” in said instruction the question was left to the jury as to what degree or quality or extent of

Terre Haute, etc., Traction Co. v. Hunter—62 Ind. App. 399.

negligence they would regard as material. Instruction No. 15 reads as follows: "In determining whether or not the boy, Harry Hunter, or his father were guilty of any material negligence which contributed to his injury in attempting to cross upon the bridge, you may take into consideration what a reasonably prudent man would have done under like or similar circumstances, bearing in mind the kind of a day it was, the condition of the boy's health, their knowledge or lack of knowledge of a way across the creek, back to their place of destination, and all other connecting circumstances therewith." This instruction is not objectionable under the holdings of both this court and the Supreme Court. *Citizens Street Ry. Co. v. Twiname* (1887), 111 Ind. 587, 13 N. E. 55; *Indianapolis, etc., Transit Co. v. Edwards* (1905), 36 Ind. App. 202, 74 N. E. 533.

No error was committed in giving instructions Nos. 12, 13 and 14 upon the court's own motion, and in refusing to give instructions Nos. 2 and 5 tendered by appellant, for the reasons stated in the discussion as to the sufficiency of the first, second and fourth paragraphs of complaint; neither did the court err in giving instruction No. 21 on its own motion. No error was committed in overruling the demurrers to the first, second and fourth paragraphs of complaint. We have examined all the questions properly presented in the very able brief of appellant's learned counsel, and find no error presented that would warrant this court in reversing this cause. A correct result was reached in the court below upon the record before us. Judgment affirmed.

NOTE.—Reported in 111 N. E. 344. Termination of liability of carrier to a passenger, 6 Ann. Cas. 1033; 19 Ann. Cas. 1019; Ann. Cas. 1915C 1223; 6 Cyc 541; note, 37 L. R. A. (N. S.) 264. Proximate cause, 29 Cyc 496, 501, 528, 641. See under (9) 38 Cyc 1909, 1912.

COCA COLA BOTTLING COMPANY v. INTERNATIONAL
FILTER COMPANY.

[No. 9,047. Filed June 20, 1916.]

1. *APPEAL.—Review.—Admissibility of Evidence.—Harmless Error.*—Where, in an action for goods sold and delivered, there was filed with the complaint, as an exhibit, what purported to be a duplicate of the order for the goods, the error, if any, in admitting the duplicate in evidence without proof of its execution was cured by the admission in defendant's deposition that the exhibit was a correct copy of the order and by the introduction of the original order. p. 423.
2. *EVIDENCE.—Admissions.—Effect.*—An admission as to a writing is like an admission as to any other fact, and it justifies the introduction of the writing in evidence. p. 423.
3. *EVIDENCE.—Admissibility.—Written Memorandum.*—In an action by a vendor against a vendee to collect for goods sold, a memorandum given the vendor by the carrier showing the receipt of the goods, the original bill of lading being unaccounted for, is not admissible in evidence except to refresh the recollection of a witness otherwise competent to testify concerning the shipment or merely to show that a receipt for the goods had been given by the carrier, but such memorandum is not competent primary evidence of its contents, since it is entirely hearsay as to such facts. p. 424.
4. *SALES.—Remedies of Seller.—Evidence.—Sufficiency.*—Where, in an action to collect for goods sold, the contract of sale provided that the buyer was entitled to thirty-five days from the date of shipment in which to test a filter and the evidence merely showed that the filter was shipped sometime after February 6, and returned to the seller on March 24, the evidence is insufficient to hold the buyer liable on the ground that he had retained the filter for a longer time than allowed for the test. p. 425.

From Vigo Superior Court; *John E. Cox*, Judge.

Action by the International Filter Company against the Coca Cola Bottling Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

George M. Crane, A. L. Miller and Orion B. Harris, for appellant.

John S. Jordan and Charles S. Pulliam, for appellee.

IBACH, J.—This was an action by appellee in the form of a common count for goods sold and delivered to recover the price of a filter alleged to have been sold and delivered to appellant. Error is assigned only in overruling appellant's motion for a new trial. The questions involved hinge upon the admissibility in evidence of three written instruments. If these were improperly admitted over appellant's objection, there was not sufficient competent evidence to sustain the decision.

The first two of these instruments are "Exhibit A" to the complaint and "Exhibit A" to the deposition of witness Engel. "Exhibit A" to the complaint purports to be the duplicate of an order from appellant to appellee, dated February 6, 1911, for the shipment of a filter to be paid for in installments. It contains the following conditions:

"It is understood that this filter and unused discs are to be returned for credit in good condition to International Filter Co., at Chicago within thirty-five days from date of shipment, if directions for use are followed, and the results obtained are not satisfactory. All conditions are expressed herein. No verbal agreement will be recognized."

It is urged that "Exhibit A" to the complaint was erroneously admitted because it was filed with the complaint merely as a bill of particulars, and not as a contract sued on; and that "Exhibit A" to the deposition of Engel was erroneously admitted because its execution was not proven and, since the suit was not founded on this exhibit, it was not referred to in the pleadings, and no notice was served on appellant that it would be offered in evidence, in accordance with §§370, 501, Burns 1914, §§364, 478 R. S. 1881. However, appellant, in answer to interrogatory No. 1 submitted to it,

Coca Cola Bottling Co. v. International Filter Co.—62 Ind. App. 421.

admitted that "Exhibit A," filed with and made part of the complaint, was a true copy of the

1. order given by appellant to appellee for the filter and discs for which payment is sought in this action. "Exhibit A" to the deposition of Engel was in the exact words of "Exhibit A" to the complaint, except that it purported to be the original of which the exhibit to the complaint was the duplicate. Appellee's secretary identified this exhibit as the order received, and testified that he ordered its entry on appellee's books, and appellant, by answer to interrogatory No. 4, admits that the filter was shipped upon the order referred to in interrogatory No. 1. If there was any technical error in the admission of the "Exhibit A" to the complaint without proof of its execution, this was removed when later the original order was identified by appellee's secretary as the order received and entered by him, and by the admission in answer to the interrogatory that the "Exhibit A" to the complaint was a true copy of the order; and no harm was done appellant. An admission as to a writing is like an admission as to any other

2. fact, and it justifies the introduction of the writing in evidence. *Dunbar v. United States* (1894), 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; *Loomis v. Wadhams* (1857), 8 Gray (Mass.) 557; *Smith v. Palmer* (1850), 6 Cush. (Mass.) 513; 1 Ency. Ev. 602. See, also, *Unger v. Mellinger* (1908), 43 Ind. App. 524, 88 N. E. 74; *Combs v. Union Trust Co.* (1896), 146 Ind. 688, 46 N. E. 16; *Aspell v. Smith* (1890), 134 Pa. St. 59, 19 Atl. 484. The admission that the exhibit was a true copy of the order was an admission that the terms of the order were correctly expressed in it.

"Exhibit D" to the deposition of Engel was a

memorandum concerning a bill of lading, part of which was in the following words:

“Use in connection with Standard Form Bill of Lading. ———s Memorandum is an acknowledgment that an Agent’s No. ——— Bill of Lading has been issued, and is not the original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

“Received * * * on the date of the receipt by the carrier of the property described in the Original Bill of Lading, at Chicago, Ill., February 8, 1911, from International Filter Co., the property described below: Consigned to Coca Cola Bottling Co., destination Terre Haute, State of Indiana.”

The shipment was described. The memorandum purported to be signed by appellee and the Pennsylvania Company. Appellant contends that this memorandum was not admissible because its execution was not proven, the original bill of lading was not accounted for, and because it did not purport to be a copy or duplicate.

Appellee’s secretary had stated that the goods in suit were shipped in response to an order from appellants, and that “Exhibit D” was the

3. receipt which the carrier, the Pennsylvania Company, had given for them. This exhibit shows on its face that it is not an original bill of lading, or a copy or duplicate, and it would not be admissible in evidence to prove a bill of lading, without first accounting for the original bill, or its duplicate, under the best evidence rule. The exhibit purports to be an original memorandum of the receipt of certain property by a carrier, for which a bill of lading had been issued, and, as between the shipper and the carrier, it would have been primary evidence as to the fact and date of

Coca Cola Bottling Co. v. International Filter Co.—62 Ind. App. 421.

receipt of such goods. As to appellant it could have been used to refresh the recollection of a witness otherwise competent to testify concerning the shipment, but the writing itself was not competent as original evidence against appellant of the correctness of its contents. There was no proof of its execution, and no proof that it was a correct record of the fact and date of shipment of the goods. Appellee's secretary had no personal knowledge of its execution or its correctness, and it was admissible in evidence merely for the purpose of showing that a receipt for the goods had been given by the carrier, but it was not competent evidence of any fact contained in it, as to which there was no independent evidence. It was entirely hearsay as to such facts, the declaration of strangers to the record made out of court. 16 Cyc 1196, 1216; *Kellner v. Phillips* (1901), 29 Ind. App. 100, 63 N.E. 877; *Loomis v. Stevens* (1897), 18 Ind. App. 184, 47 N.E. 237; *Walling v. Morgan County* (1899), 126 Ala. 326, 28 South. 433; *Tobler v. Austin* (1902), (Tex.) 71 S. W. 407; *Ft. Worth, etc., R. Co. v. Cauble* (1906), 41 Tex. Civ. App. 348, 91 S. W. 244; *Texas, etc., R. Co. v. Leggett* (1905), 86 S. W. 1066; *Phenix Ins. Co. v. Hart* (1900), 112 Ga. 765, 38 S. E. 67; *Price v. Standard Life, etc., Ins. Co.* (1903), 90 Minn. 264, 95 N. W. 1118; *Foster v. Fidelity, etc., Co.* (1898), 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833; *Railway, etc., Ass'n v. Robinson* (1893), 147 Ill. 138, 35 N. E. 174.

Appellant's contention, which is supported by its evidence, is that appellant was to have thirty-five days to actually test the filter; that it was

4. received by appellant on February 18, tested twenty-five days and reshipped on March 21 to appellee, who received it on March 24. Appellee's contention is that the sale was complete if the

filter was not returned within thirty-five days from the date of shipment, and that it was shipped on February 8, and therefore not returned within thirty-five days from that date. However, the only evidence to show that the filter was shipped on February 8 is "Exhibit D" to the admission of Engel above referred to, and this is incompetent to prove the date of shipment. There is no other evidence as to the exact date of shipment, except that it was later than February 6. This being the condition of the evidence, appellee has failed to prove an essential element of its case, namely, that the filter was not returned to it within thirty-five days from the date of shipment. The decision of the court is not sustained by sufficient evidence, and the judgment is reversed, with directions to sustain appellant's motion for new trial.

NOTE.—Reported in 113 N. E. 17. See under (1) 4 C. J. 983; 38 Cyc 1432; (2) 16 Cyc. 942; (3) 16 Cyc 1196, 1216.

COQUILLARD ET AL. v. COQUILLARD.

[No. 9,040. Filed June 21, 1916.]

1. **WILLS.—Construction.—Contingent Remainders.**—Under a will devising a life estate in lands owned in fee to the testator's two sons as tenants in common, share and share alike, the remainder in fee going to the children of such children, and the residue of the testator's estate is devised one-third to the wife and two-thirds to the sons, the remainder in fee, prior to the birth of a child to a son, is not a vested but a contingent remainder which, on the birth of a child to a son, will at once vest in such child, subject to be opened up to let in children thereafter born to such son. p. 432.
2. **WILLS.—Construction.—Qualified or Determinable Fee.**—Where a testator devised a life estate in lands owned in fee to his two sons, as tenants in common, share and share alike, with the remainder over to such children as might be born to the sons, the estate of the testator in the fee was not exhausted by such devise, since as to a son there remains undisposed of an estate impliedly limited on his life estate and impliedly limited by the contingent remainder in fee created in the children of such son; and the undis-

- posed residue, upon the removal of the possibility of the birth of a child to such son, will ripen into a remainder in fee, free from limitations over, such residue of the estate being in the nature of a qualified or determinable fee. p. 433.
3. ESTATES.—*Determinable Fee.—Inheritance.*—A qualified or determinable fee is an estate of inheritance, descendible to heirs and may be devised or assigned. p. 434.
4. WILLS.—*Construction.—Residuary Clause.*—To avoid partial intestacy, a residuary clause in a will should be liberally construed and words used therein given the widest possible scope so that all property, not otherwise disposed of and not specifically excepted from the operation of such a clause, passes by virtue of its provisions. p. 434.
5. WILLS.—*Qualified Fee.—Residuary Clause.*—Where a testator devised a life estate in land owned in fee to two sons, A and B, in common, share and share alike, with the remainder over to their children, the qualified fee in the undivided one-half of such lands, not being devised by any item of the will, would pass into the residue of the estate, which was disposed of by a general residuary clause, one-third to the widow and two-thirds to the sons as tenants in common in equal parts, and A owns a remainder in fee in the undivided one-third of the other half of the real estate which was bequeathed to B, subject to B's life estate therein and to be divested by the birth of a child to B, and B owns the same interest in the qualified fee of A. p. 434.
6. PARTITION.—*Right of Action.—Title and Possession.*—Plaintiff, a tenant in common with his brother under the terms of his father's will, owing a life estate in an undivided one-half of the lands involved and, as such, being entitled to the possession of such lands in common with his brother, may maintain an action considered strictly as a proceeding for partition, in so far as the elements of title and possession are essential to such form of action and may therein also bind his cotenant and all remaindermen that are parties thereto. p. 435.
7. PARTITION.—*Divesting of Title.—Hearing.*—One may be divested of his estate by operation of law, and without his consent, as by a decree of court entered in a proper proceeding, but it is generally necessary, however, that such a decree be entered in a proceeding in which he has an opportunity to be heard by being properly made a party thereto, and, if not so made a party, it is the general rule that the decree is not binding on him. p. 436.
8. PARTITION.—*Nature of Action.*—The remedy by partition had its origin at common law, but in this state it is regulated by statute. p. 436.
9. PARTITION.—*Jurisdiction.—Legal and Equitable Remedies.*—Under §1244 Burns 1914, §1187 R. S. 1881, conferring authority to act in partition proceedings on circuit courts and courts having probate jurisdiction and under §249 Burns 1914, §249 R. S. 1881,

giving to such tribunals the right to determine in the same suit actions at law and suits in equity, such courts have the power, to the full extent of their jurisdiction, to administer both legal and equitable remedies in a proceeding for partition. p. 437.

10. PARTITION.—*Effect of Suit.*—*Title.*—In an action for partition resulting in a division rather than in a sale of the lands, the title of the owners is neither enlarged nor diminished, as their respective shares are merely ascertained and set off to them in severalty; and, where the proceeding results in a sale of the lands as indivisible, the various estates and interests therein are merely transferred to the fund arising from such sale, as provided by §1261 Burns 1914, §1204 R. S. 1881. p. 438.

11. PARTITION.—*Sale of Lands.*—*Interest of Contingent Owners Not in Being.*—Where a testator devised a life estate in an undivided one-half of certain lands to each of two sons, with the remainder in fee to the children, if any be born, of such sons, and by another item of the will a qualified fee in such lands was created in the widow and two sons as tenants in common, such qualified fee being subject to be divested by the contingent estate, it was not erroneous for the trial court to make a decree, in an action for partition wherein the widow and the two sons were properly made parties, no children having been born to such sons, that the lands should be sold free of all life estates and remainders and that a title in fee simple pass to the purchasers free from all claims of the parties to the proceedings, their heirs and descendants. pp. 443, 444.

12. PARTITION.—*Sale.*—*Distribution of Proceeds.*—*Order.*—In an action for partition where the evidence disclosed that a testator had devised a life estate in an undivided one-half of certain lands to each of two sons as tenants in common, with the remainder in fee to the children, if any be born, of such sons, and another item of the will created in the widow and two sons a qualified fee, subject to be defeated by the contingent estate, and at the time of the action no children had been born to the sons, the funds arising from the sale of the lands, as decreed by the court, should be distributed as follows: First, the payment of the costs and expenses of the action; second, the residue of the fund should be loaned or invested with proper security, the net income to be equally divided between the two sons until the death of one of them, whereupon, if there has been no child born to such deceased son, one-half of such fund should be distributed to his heirs, to his brother and to the testator's widow or her heirs, but if children have been born alive to such son, on his decease, the one-half of such fund should be distributed to such children, if living, or to the heirs of those deceased and a like course should be pursued as to the other half of the fund. p. 446.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Alexis Coquillard against Joseph A. Coquillard and another. From a judgment for plaintiff, the defendants appeal. *Reversed.*

Rich & Rich, for appellants.

Hubbard & Hubbard, for appellee.

CALDWELL, C. J.—Appellee brought this action against appellants to procure the partition and sale as indivisible, of certain lands situate in St. Joseph County, of which Alexis Coquillard, Sr., died seized in fee, and of the estimated value of \$113,575, which lands are the same as those described in the third item of his will hereinafter set out. *Coquillard v. Coquillard* (No. 9033), 62 Ind. App. 489, 113 N. E. 481, is in many respects a similar case.

The questions properly presented arise under exceptions reserved by appellants to conclusions of law stated on a special finding of facts. The finding, to the extent material here, is to the following effect: Alexis Coquillard, Sr., died testate in said county, February 26, 1890, seized in fee of said lands as aforesaid, and leaving surviving him as his only heirs at law his widow, the appellant Maude M. Coquillard, born October 23, 1854, and his sons, appellant Joseph A. Coquillard, born December 18, 1884, and appellee, born January 21, 1882. His will was duly probated March 3, 1890. His estate has been settled and the executor of the will discharged, and all trusts created by the will have been fully executed. Both sons are unmarried, and no child has been born to either of them. The third and seventeenth items of the will are as follows:

“Third. I give and devise to my said sons, and other children if I should have any” (the land involved, describing it) “to have and to hold the same unto my children, and such other

children as may be born unto me, in common share and share alike, during their respective lives, and the remainder from and after the death of my said children I give and devise to such children as may be born unto my said children, such descendants of my said children to take the share of their parents per stirpes and by way of purchase. Provided, however, that whereas my said children are now infants, my said wife, Maude M. Coquillard, shall have, hold, manage and control all the land described in this paragraph of this will during the minority of the youngest of my surviving children, and during such period of time she shall be entitled to collect all rents arising from said property, she shall keep the buildings on said premises insured for two thirds value, and rebuild in case of loss by fire so far as the insurance will go, my trustees to pay balance of cost of rebuilding, and pay all taxes and assessments on said lands and keep said property in good repair."

"17th. I give and bequeath all the residue of my estate, both real and personal, to my wife and children, my wife to have one third and my children two thirds thereof."

The court finds that the devised real estate is suburban, with a residence thereon; that it is subject to heavy assessments for taxes and urban improvements; that it yields but little income and is a source of expense greatly exceeding the income therefrom; that its main value consists in its fitness for subdivision and sale as urban real estate; that it is not susceptible of division among the parties and cannot be partitioned among the respective owners, and that it should be sold and the proceeds distributed. The conclusions of law are as follows: "1. That the plaintiff, Alexis Coquillard, has an estate for life in the undivided half of said real estate; that until a child is born to him in lawful

wedlock he owns in remainder the fee simple of an undivided one third thereof; that upon the birth of such child a remainder in fee in the said undivided half shall vest in such child, subject to the father's life estate, and subject to be divested and shared in fee, share and share alike with any other child or children of said Alexis Coquillard, thereafter born to him as aforesaid. 2. That the defendant, Joseph A. Coquillard, has an estate for life in the undivided half of said real estate; that until a child is born to him in lawful wedlock he owns in remainder the fee simple of an undivided third thereof; that upon the birth of such child a remainder in fee in the said undivided half shall vest in such child, subject to the father's life estate and subject to be divested and shared in fee share and share alike with any other child or children of said Joseph A. thereafter born to him as aforesaid. 3. That the defendant, Maude M. Coquillard, has a fee simple in the undivided one-third of said real estate, subject to the life estate of Alexis Coquillard and Joseph A. Coquillard and subject to be divested on the birth of a child to either of said sons, so as to permit such child to take its father's one-half share in fee simple as above provided. 4. That said lands should be sold free of all life estates and remainders and a title in fee simple pass to the purchaser free from all claims of the parties herein, their heirs and descendants. 5. That on the sale of any of said lands the proceeds, after payment of costs, fees and expenses, as adjudged hereafter by the court, shall be distributed as follows: To each son the value of his life estate as herein found to be computed according to the mortality tables, and the residue to be divided into three equal parts. Each of said sons shall execute his bond payable to

the State of Indiana and conditioned that the obligor shall pay over to the duly appointed guardian of any child born to the obligor the share of such child under the third clause of the testator's will, as herein found."

To determine the correctness of the conclusions of law necessitates that we place a construction on the third and seventeenth items of the will. In doing so, there are certain provisions of the third item that may be eliminated: Thus, the language by which the testator expressed his intention that children born to him subsequent to the execution of the will should participate on equal terms with the children then in being, in the estate created in the latter by such item. Such language may be eliminated for the reason that additional children were not born to him, and the possibility thereof was removed by his decease. The proviso clause of such item may also be eliminated for the reason that the estate thereby created in and the duties thereby imposed on the widow have terminated by the testator's youngest son reaching and passing his majority. Proceeding to consider the remaining provisions of the third item, first in its relation to appellant, Joseph A. Coquillard, it is apparent that the testator thereby devised to such son an estate in the undivided one-half of the lands described, for and during the period of his natural life as tenant in common with his brother. He next devised to the children of such son, as tenants in common, a remainder in fee in such undivided one-half of such lands. As no children have been

born to such son, the beneficiaries of such

1. remainder are not ascertained, because not in being. The remainder in fee, therefore, is contingent rather than vested. On the birth of a child to such son, such remainder will at once vest

in such child, subject to open up to let in children thereafter born to such son, on equal terms with those theretofore born. *Fearne*, Cont. Rem. 9; 24 Am. and Eng. Ency. Law 397; *Amos v. Amos* (1889), 117 Ind. 19, 19 N. E. 539; *Aldred v. Sylvester* (1915), 184 Ind. 542, 111 N. E. 914; *Doe v. Considine* (1867), 6 Wall. (U. S.) 458, 18 L. Ed. 869; *Alsman v. Walters* (1914), 184 Ind. 565, 106 N. E. 879, 111 N. E. 921; *McIlhinny v. McIlhinny* (1894), 137 Ind. 411, 37 N. E. 147, 24 L. R. A. 489, 45 Am. St. 186.

The estates created in appellee and his children by such item are identical with those created in appellant Joseph A. Coquillard and his children, but involve the remaining undivided one-half of the lands.

It is evident that the estate in fee simple of which testator died seized is not exhausted by the estates carved therefrom by the third item

2. of the will. Limiting our discussion, for purposes of clearness, to the estates created in Joseph A. Coquillard and his children in the undivided one-half of such lands, it is evident that there remains undisposed of by such third item an estate impliedly limited on the life estate created in Joseph A. Coquillard, and impliedly limited by the contingent remainder in fee created in his child or children. The event by which such residue of the estate is limited is of a nature that it may never occur. A child or children may or may not be born alive to Joseph A. Coquillard. If a child or children be born alive to him, such residue of estate will thereupon determine, and such contingent remainder in fee will become vested as aforesaid. The course of time will disclose that a child has been, or that a child can not be born to

him. When the possibility of the birth of a child to him has been removed, if such should be the case, such residue of estate will ripen into a remainder in fee free from limitations over. Such residue of estate is therefore in the nature of a qualified or determinable fee. Tiedeman, Real Prop. §§36, 211; 16 Cyc 602; 10 R. C. L. 652; *First Universalist Society v. Boland* (1892), 15 L. R. A. 231, note. As such estate may continue forever,

it is an estate in fee. It is an estate of inheritance, descendible to heirs and may be devised or assigned. *Aldred v. Sylvester*, *supra*; *Mendenhall v. First New Church, etc.* (1911), 177 Ind. 336, 98 N. E. 57.

In order to avoid partial intestacy, a residuary clause in a will should be liberally construed. Words used therein are given the widest possible

scope. If general in its terms, all property not otherwise disposed of and not specifically excepted from the operation of such a clause, passes by virtue of its provisions. Page, Wills §507; *Barker v. Town of Petersburg* (1907), 41 Ind. App. 447, 82 N. E. 996.

It follows that as such qualified fee in the undivided one-half of such lands is not devised by the third or any other item of the will, it passed

into the residue of the estate, and by the seventeenth item, which is a general residuary clause, it is devised to the widow and the two sons as tenants in common in equal parts. A like line of reasoning leads to a like result respecting the other one-half of such estate in fee limited on the life estate of Alexis Coquillard, and limited by the contingent remainder in fee created in his child or children. The first conclusion of law deals only with the undivided one-half of the real estate. It therefore fails to cover Alexis Coquillard's entire

interest in such qualified fee. It should contain an additional statement that Alexis Coquillard, until a child is born to his brother Joseph Coquillard, owns also a remainder in fee in the undivided one-third of the other half of such real estate, subject to Joseph Coquillard's life estate therein, and subject also to be divested and defeated by the birth of a child to Joseph, as stated in the second conclusion. A like infirmity exists in the second conclusion, in its relation to Joseph Coquillard's interest in such qualified fee, and such conclusion should be likewise restated and modified. The third conclusion is correct.

We next direct our attention to the fourth conclusion of law. We are thus required to determine whether, under the surrounding circumstances, appellee is entitled to maintain this action, and whether the court was authorized to entertain it and decree the partition and sale of the lands involved. Appellee, as a tenant in common with his brother,

is the owner of an undivided one-half of the
6. lands for the period of his natural life, and
as such, the right to the possession of such
lands rests in him in common with his brother. It is, therefore, evident that he has title to an estate therein as a tenant in common with a present right to possession, and that he may maintain this action considered strictly as a proceeding for partition, in so far as the elements of title and possession are essential to such form of action. In such action, he may also bind his cotenant and all remaindermen who are parties thereto. *Hawkins v. McDougal* (1890), 125 Ind. 597, 25 N. E. 807; *Shaw v. Beers* (1882), 84 Ind. 528; *Tower v. Tower* (1895), 141 Ind. 223, 40 N. E. 747.

Of the estates into which the estate in fee simple of which testator died seized is carved by the third

and seventeenth items of the will, all the owners of the life estates and all the owners of such qualified fee are made parties. The contingent owners of the contingent remainders in fee are not parties to the proceeding. As they are not in being they cannot be made parties. It is possible only that they will ever be in being. Under such circumstances, will the decree entered in this proceeding bind them when in being, and if in being, or may it be so formulated that it will be binding on them?

One may be divested of his estate by operation of law, and without his consent, as for illustration, by the decree of a court entered in a proper

7. proceeding where the court has jurisdiction over his person and the subject matter of the action. To that end, however, it is essential, at least as a general rule, that such decree be entered in a proceeding in which he has an opportunity to be heard by being properly made a party thereto. If not so made a party, it is a general rule, to which the courts as matter of practical necessity recognize exceptions, that a decree is not binding on him. We proceed to determine whether the situation here invokes an exception.

The remedy by partition had its origin at common law. Subsequently, it was extended by English statutes. Eventually equity assumed

8. a concurrent jurisdiction, which in England at a later date became exclusive. In the various jurisdictions of this country, the proceeding is regulated by statute. 21 Am. and Eng. Ency. Law 1142, *et seq.* The remedy by statute is in many jurisdictions regarded as cumulative. Freeman, Coten. and Part. (2d ed.) §§428, 429, 449; 30 Cyc 170, 171 and cases.

In this State partition is regulated by statute. Jurisdiction is conferred on circuit courts or courts

having probate jurisdiction. §1244 Burns 1914, §1187 R. S. 1881. In this State jurisdiction

9. in what were formerly actions at law and also suits in equity is committed to the same tribunals, and such tribunals to the full extent of their respective jurisdictions, may administer both legal and equitable remedies in the same suit. §249 Burns 1914, §249 R. S. 1881. In a partition proceeding, the rights of the parties, whether legal or equitable, are equally within the cognizance and protecting power of the courts. *Milligan v. Poole* (1871), 35 Ind. 64; *Martindale v. Alexander* (1866), 26 Ind. 104, 89 Am. Dec. 458; *Schee v. McQuilken* (1877), 59 Ind. 269.

In the case at bar, unless a court exercising equitable powers may otherwise decree, the real estate involved cannot be sold and conveyed by perfect title until the expiration of the life estates created by the third item of the will. This is apparent from the nature and quantity of the various estates created by the will. As measured by the Carlisle tables of mortality, the life expectancy of testator's sons at his decease were approximately 50 and 51 years respectively. At the commencement of this action in 1914, such expectancies were approximately 33 and 34 years respectively. At the former time the real estate involved was situated a distance from South Bend, then a city of 21,000 inhabitants; at the latter time, a part of such real estate was within the city limits and the balance contiguous thereto, and the city had increased in population to about 65,000 inhabitants. The proximity of the real estate to the city naturally increases its value, if such value may be rendered available, but does not necessarily augment its capacity to produce revenue. From an increase in value there inevitably results an increase in taxa-

tion expenses. Proximity to and absorption into the territorial limits of the city subject the real estate to assessments for public improvements in the ordinary course of events. The court finds that the period has arrived when the expenses of maintaining the real estate greatly exceed the income derived therefrom, and also that the value of such real estate consists mainly in the fact of its fitness for subdivision and sale as urban real estate. The tendency of taxation and special assessment charges is upward rather than downward. If the present status of this real estate must be maintained, until the termination of the life estates created therein, it is at least possible that no owner of a limited estate therein will feel justified in discharging such land from taxation and special assessment charges as they arise. Moreover, it is apparent from the finding that such real estate in the present condition of its title, stands as a partial barrier to the proper growth and development of the city of South Bend, and consequently to the development of the State. These considerations are sufficiently potent to arouse the powers of the court to the point of diligent inquiry whether there may not be a way within the equitable jurisdiction of the court by which the lands may be sold and the interest of all persons, including contingent owners not in being, safeguarded by the proper administration of the fund derived.

We are thus brought face to face with the question, whether the court under the circumstances was authorized to direct the sale of the real

10. estate as against testator's sons' children not in being. In approaching this question, it should be remembered that in an action for partition, conceding that this proceeding must be regarded only as such, resulting in a division rather

than in a sale of the lands, the owners are not divested of any title or given any new title. Their respective shares are merely ascertained and set off to them in severalty. *Avery v. Akins* (1881), 74 Ind. 283. If such a proceeding results in a sale of the land as indivisible, the various estates and interests therein are merely transferred to the fund. §1261 Burns 1914, §1204 R. S. 1881. In cases where titles are complicated by limitations and contingencies, both private and public interests may, under some circumstances, require the sale of the involved real estate, even as against persons not in being. In such a situation, courts are sometimes impelled to act by expediency and practical necessity, binding the interests of persons not in being by recourse to the principle of representation. The Court of Appeals of South Carolina, in holding that a tribunal of competent jurisdiction may by its decree bind the contingent titles of remaindermen not in being, where all interested persons who could be made parties are brought before the court, uses this language: "To say that the Court could not under circumstances like these convey away the fee, would be to assert a doctrine that would render conditional limitations and contingent remainders an intolerable evil to a growing and prosperous community. Thus to shackle estates without the power of relief, unless every person having a contingent and possible interest could be brought before the Court, as a party complainant or defendant, according to the usual forms and ordinary practice of the Court, would be to sacrifice rights and interests of the present generation to those of posterity, * * * . If the whole property of the country were thus situated, it is obvious that all improvement and advance would be completely checked. And this check upon progress and im-

provement would be in direct proportion to the extent to which this state of things exists. The case before the Court is an apt illustration. Here are valuable unimproved lots, in a thriving and prosperous town, which the life-tenant cannot with a due regard to his interest improve, and the remaindermen cannot, because their rights are contingent and may never vest." *Bofil v. Fisher* (1850), 3 Rich. Eq. (S. C.) 1, 55 Am. Dec. 627.

The following language is used at page 51 of a valuable editorial note to *Downey v. Seib* (1906), 8 L. R. A. (N.S.) 49: "The complication of human affairs has become such that it is impossible for courts to act strictly on the general rule not to bind the interest or declare the right of any man in his absence. Cases arise in which, if you hold it necessary to bring before the court every person having an interest in the question, the suit could never be brought to a conclusion. The consequence would be that, if the court adhered to the strict rule, there would in many cases be a denial of justice. This has induced the courts to sanction a relaxation of the rule. And accordingly they have said: If we can be satisfied that we have before the court persons whose interests are the same as the interests of those who are absent, we will be content to hear the cause upon the argument of such persons; and, if we are then satisfied that the case has been fairly and honestly presented, we will order the distribution of the fund on the representation of the persons present. *Powell v. Wright* (7 Beav. 444)."

In a case involving the contingent title of persons not in being, the Court of Appeals of New York said: "Where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living

owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for, if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons." *Kent v. Church of St. Michael* (1892), 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 631, 32 Am. St. 693.

In a like case, the Court of Errors and Appeals of New Jersey says: "The established rule of equity practice is that estates limited over to persons not *in esse* are represented by the living owner of the first estate of inheritance." *Dunham v. Doremus* (1897), 55 N. J. Eq. 511, 37 Atl. 62. In discussing the doctrine of representation and its application, Judge Story says: "And as it is sufficient to bring the first tenant in tail before the court, if in being, whether he be plaintiff or defendant in the suit; so, if there be no such tenant in tail in being, the first person in being, entitled to the inheritance, should be made a party; and if there be no such person in being, then the tenant for life; and in such a case, the decree made will bind the other persons not in being. Thus, if there be a tenant for life of an undivided share of an estate, with remainder to his unborn sons in tail, the tenant for life may maintain a bill for partition, and the decree will be binding upon the sons, when they come *in esse*. So, if there be a tenant for life, remainder to his first son in tail, remainder over; and the tenant for life is brought before the court before he has issue, it is settled in equity, that the contingent remaindermen are barred, and (as has been said)

from necessity. So, where there are contingent limitations and executory devises to persons not in being, they may in like manner be barred by a decree against a person claiming a vested estate of inheritance." Story, Eq. Pleading §145. The same author says that while there are exceptions to the rule "the cases within the exception must, however, stand upon peculiar equities and interests not affected by the same circumstances, which attach to the prior parties." Id. §146.

On the subject of exceptions, Mr. Freeman says: "An English case recognizes an exception to this principle of virtual representation, by denying its applicability in cases where the person seized in fee is liable to have his seizin defeated, by a conditional limitation or an executory devise, because, in that event, the estate is insufficiently represented by the person holding the first vested estate of inheritance. This exception is repudiated so far as it seems to be noticed in the United States." Freeman, Coten. and Part. (2d ed.) §482. In a leading New York case the court in applying the doctrine of representation says: "It is not a question of entirely divesting and destroying such contingent interests; but simply a question whether the property upon which they are attached may be changed in form; whether land may be converted into personal securities under the direction of the court, preserving such interests intact upon the property in its new form. * * * A decree against the person having the first estate of inheritance would bind those in remainder or reversion, although the estate might afterwards vest in possession. * * *

"It would therefore follow, as a matter of course, from this rule, that contingent limitations and executory devises to persons not in being would

in like manner be bound by a decree against the virtual representative of these remote and contingent interests, the person having the first vested estate of inheritance." *Mead v. Mitchell* (1858), 17 N. Y. 210, 72 Am. Dec. 455.

In the case at bar testator's sons as the owners of the life estates created by the third item of the will are parties. The widow also is a party.

11. As we have said the qualified fee that arises under the seventeenth item of the will is vested in the widow and sons as tenants in common. Such qualified fee, although liable to be defeated by the contingent estates created by the third item of the will, is, as we have said, an estate of inheritance. The contingent owners of such contingent estates are not in being. It follows that all possible parties are before the court. By way of illustration, if one of such contingent owners were in being and a party to the proceeding, his interests would not be broader than the question of the amount of the land that should be set off to his father as life tenant, on a division of the land, or the question of the amount of the selling price, if the land should be ordered sold. The interests of such contingent owners would be so measured, because the land so set off, or that part of the purchase price or its equivalent representing it would eventually come into his possession or the possession of his heirs, possibly, however, in common with brothers and sisters subsequently born. His interest would not be broader than as indicated. The father as life tenant has a like interest neither narrower nor broader. If the real estate should be divided, he would be interested in the amount of the same identified as his share. If the lands should be sold, he would be interested in the distributive amount representing his estate in the land. The larger the

selling price, the larger such amount. On the sale of the lands, the parties to the proceedings as tenants in common to such qualified fee will likewise be interested in the amount of the selling price. We fail to see that the interests of such contingent owners are not fully represented in this proceeding. We, therefore, hold that under the circumstances of this case, even though it be re-

11. garded solely as a proceeding for partition, the court did not err in the fourth conclusion of law. In addition to authorities above cited, see the following: *Downey v. Seib*, *supra*, note p. 67; *Rutledge v. Fishburne* (1903), 97 Am. St., note p. 766; 30 Cyc 205; *Cheesman v. Thorne* (1833), 1 Edw. Ch. (N. Y.) 629; *Fox v. Fee* (1897), 24 App. Div. 314, 49 N. Y. Supp. 292, 298; *Carter v. White* (1904), 134 N. C. 466, 46 S. E. 983, 101 Am. St. 853, 870, note p. 868; *Gavin v. Curtin* (1898), 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776; *Ridley v. Halliday* (1900), 106 Tenn. 607, 61 S. W. 1025, 53 L. R. A. 477, 82 Am. St. 902; *Hale v. Hale* (1893), 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247.

The fifth conclusion of law is to the effect that the proceeds derived from the sale of the lands should be distributed, first, to the payment of costs and expenses; second, to each son the value of his life estate estimated on his life expectancy under the mortality tables; third, that the residue be divided into three parts, and that each son execute his bond conditioned for the payment to the legal guardian of any child born to him, the share of such child under the third item of the will. It will be observed that the provision of such conclusion, which we have designated as the third conclusion, is indefinite. While it is specified that the residue should be divided into three parts, there is no provision as to the disposition of such parts. Pre-

sumably, the court intended to state that one of such parts should be paid to the widow and one to each son, as owners of such qualified fee, under the seventeenth item of the will. If so, there is no provision respecting the safeguarding of the one-third to be paid to the widow, unless the bonds to be executed by the sons are intended to be broad enough to that end.

The decree on the subject of distribution is less definite than the fifth conclusion. It merely directs in general terms that, after the payment of the costs and expenses, the balance be paid to the parties to the proceeding in proportion to their several interests in the real estate. There is no provision for the protection of the fund.

The possibilities of the situation here should be considered. Each son is plainly seized of a life estate in the undivided one-half of the lands. Under the seventeenth item of the will there is, in effect, devised to each son in addition, a one-third interest in the qualified fee in the undivided one-half of such lands, subject to his life estate therein, and a like interest in the qualified fee in the other half of such lands subject to his brother's life estate therein. The widow also, under such item, is devised a one-third interest in the qualified fee in each one-half, subject to the life estate therein. As we have said, should a child be born alive to either son, such event will terminate such qualified fee in the undivided one-half of the lands, and vest the contingent remainder in such child as aforesaid. Should a child be born alive to each son, a like result will follow as to each half of the real estate. In speaking of the birth of a child, or of a child born alive, in this opinion, we intend to include a child in *ventra sa mere*, afterwards born alive. *Knotts v. Stearns* (1875), 91 U. S. 638, 23 L.

Ed. 252; *Biggs v. McCarty* (1882), 86 Ind. 352, 44 Am. Rep. 320; *Carter v. White*, 101 Am. St., note p. 869. Should one son die, no child having been born to him, and leaving his brother surviving him, such event will of course terminate the life estate of the former, destroy the contingent remainder in the half of the lands, and ripen the qualified fee therein into a fee simple absolute, the one-third of which would thereupon descend to the heirs of such son, one-third thereof vest in the surviving brother, and one-third in the widow, if living, or descend to her heirs, if deceased. On the decease of the other brother, no child having been born to him, a like result would follow as to the other half of the lands. Hence, the importance of safeguarding the fund in some proper manner. This may be done by

12. first paying the costs and expenses of the action, since such costs and expenses were incurred for the benefit of all persons interested, and under the special circumstances presented by this case, by the proper administration of a trust which necessarily arises out of the situation involving the residue. Such trust should be administered as follows: By the loaning or investing of the fund with proper security until the decease of a son. During such time the net income should be divided between the two sons. On the decease of a son, no child having been born to him, the one-half of such residue should be distributed to his heirs or legatees, to his brother, and to the widow or her heirs or legatees, as above indicated. If children have been born alive to such son, on his decease the one-half of such fund should be distributed to such children, if living, and to the heirs or legatees of those deceased. A like course should be pursued as to the other half of the fund. See *Ruggles v. Tyson* (1899), 104 Wis. 500, 79 N. W. 766, 48 L. R. A. 808;

Lake Erie, etc., R. Co. v. McConkey—62 Ind. App. 447.

Noble v. Cromwell (1858), 26 Barb. (N. Y.) 475; *Gavin v. Curtin*, *supra*; *Coquillard v. Coquillard*, (1916), *supra*; *Mead v. Mitchell*, *supra*; *Cheesman v. Thorne*, *supra*.

The judgment is reversed, with instructions to restate the first, second and fifth conclusions of law in harmony with this opinion, and to decree accordingly.

NOTE.—Reported in 113 Ind. 474. See under (1) 40 Cyc 1676; (2), (3) 16 Cyc 602, 603; 40 Cyc 1589-1593; (4), (5) 40 Cyc 1564-1566; (6) 30 Cyc 188, 191; (7) 30 Cyc 201, 202; (8), (9) 30 Cyc 170, 171; (10) 30 Cyc 308; (11) 30 Cyc 205, 272; (12) 30 Cyc 291; 119 Am. St. 586.

LAKE ERIE & WESTERN RAILROAD COMPANY v.
McCONKEY.

[No. 9,074. Filed June 21, 1916.]

1. APPEAL.—*Briefs*.—*Assignment of Errors*.—*Waiver of Errors*.—Such of the assigned errors as are not presented by the appellant's brief will be deemed to have been waived. p. 449.
2. NEW TRIAL.—*Motion for New Trial*.—*Time for Filing*.—*Statute*.—Under the statute (§587 Burns 1914, Acts 1913 p. 848) an application for a new trial must be filed within thirty days from the time when the verdict or decision is rendered, and no question of error as to the overruling of the application is presented where it was filed more than thirty days after the rendition of the verdict. p. 449.
3. APPEAL.—*Motion for Judgment on Interrogatories*.—*General Verdict*.—*Presumption*.—In determining whether error was committed in overruling the motion for judgment on the answers to interrogatories, the court will assume in favor of the general verdict that every supposable fact legally admissible under the issues was proven in support of such verdict. p. 450.
4. TRIAL.—*Verdict*.—*Effect of*.—Where, in an action for damages, the issue was presented by the filing of an affirmative answer to which there was a reply of general denial, the general verdict for the plaintiff is a finding in favor of the averments of the complaint and against those of the affirmative answer that are in conflict with the former. p. 452.
5. TRIAL.—*General Verdict*.—*Answer to Interrogatories*.—It is the duty of the court to reconcile the answers to special interrogatories

with the general verdict if possible, and the court should consider all of the interrogatories and answers together, in connection with any and all facts favorable to the general verdict that might have been legally proven under the issues, and if, when so considered, there is a reasonable possibility of reconciliation between such answers and the general verdict, the latter must stand. p. 453.

6. *CARRIERS.—Actions for Injuries.—Answers to Interrogatories.—General Verdict.—Consistency.*—In an action for damages for personal injuries alleged to have been due to the defendant company's negligence in permitting a freight truck to be left on the platform of its passenger station in such a position as to fall or roll against plaintiff, who was waiting to board a train, the jury answered interrogatories to the effect that the plaintiff was injured in the place and manner alleged; that the presence of the truck on the platform was dangerous; that at the time of the injury a person waiting to take passage on a train was leaning against or climbing upon the truck without defendant's knowledge; and that the immediate and proximate cause of plaintiff's injury was the act of such other person in getting upon the truck, thus causing it to fall or roll against the plaintiff. *Held*, that such answers are not necessarily contradictory or inconsistent with the general verdict. p. 454.
7. *NEGLIGENCE.—Concurrent Negligence.—Liability.*—It is no defense to an action for a negligent injury that the negligence of a third person contributed to cause the injury, if the negligence of the defendant was the efficient cause, as the fact that some other cause operates concurrently with his negligence in the production of the injury does not relieve the defendant from liability. p. 455.
8. *TRIAL.—Form of Interrogatories.—Conclusion.*—In an action against a carrier for injury caused by plaintiff being struck by a freight truck, and an interrogatory requiring the jury to answer as to whether the act of another person in climbing upon a truck, causing it to fall against the plaintiff "was the immediate and proximate cause of the plaintiff's injury" was improper, since it calls for an answer involving the legal definition of the term "proximate cause", and hence calls for a conclusion. p. 456.

From Henry Circuit Court; *Ed Jackson*, Judge.

Action by Minnie McConkey against the Lake Erie and Western Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

John B. Cockrum, W. G. Butler, Bundy & Jones
and *John L. Rupe*, for appellant.

Forkner & Forkner, for appellee.

HOTTEL, P. J.—This is an appeal from a judgment for appellee for \$1,000, in a suit brought by her to recover damages for injuries alleged to have been caused by appellant negligently permitting one of its freight trucks to be left on its platform in such position and at a place where it rolled out and struck appellee, when she was on such platform to take passage on one of appellant's trains. Five errors are assigned in this court, but as only two of them are presented by appellant's brief, the others will be deemed waived.

1. *Kemery v. Zeigler* (1915), 184 Ind. 144, 109 N.E. 774; *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218, and cases cited. The errors presented are those which challenge the action of the trial court in overruling appellant's motion for judgment on the answers to interrogatories, and its motion for new trial. The verdict on which the judgment appealed from rests was returned May 20, 1914. The motion for a new trial was not filed until July 1, 1914,
2. and more than thirty days after the verdict was rendered. Section 587 Burns 1914, Acts 1913 p. 848, provides: "The application for a new trial may be made at any time within thirty (30) days from the time when the verdict or decision is rendered * * * and not afterwards." In construing this provision of the statute, the Supreme Court in the case of *Talbot v. Meyer* (1915), 83 Ind. 585, 109 N. E. 841, 842, said: "This act positively fixes the time for the filing of a motion for a new trial within thirty (30) days from the rendition of the verdict, and emphatically declares that it shall not be filed afterwards." See also *Acme White Lead, etc., Works v. Indiana Wagon Co.* (1916), 61 Ind. App. 644, 112 N. E. 392.

The only question remaining is the ruling on appellant's motion for judgment on the answers to interrogatories. Such interrogatories and answers are as follows: "1. Was the plaintiff's injury for which she sues in this cause caused by her being struck by a truck on the platform of defendant's station, at Cambridge City, Indiana, June 30, 1912? Answer. Yes."

"2. Was there at the time the truck fell and struck plaintiff's leg a man by name of Shook climbing upon or sitting or leaning with his whole body upon the truck? Answer. Yes."

"3. Was the man Shook on the truck a man waiting to take passage on same train with plaintiff? Answer. Yes."

"4. Was the man upon the truck an employe or in any relation with the defendant except that he was waiting as a passenger to take passage on the train? Answer. No."

"5. Did any employe of defendant give any direction to the man Shook to get upon the truck or have any knowledge of his being upon it prior to the accident? Answer. No."

"6. Would the presence or position of the truck have constituted any danger on the platform but for the act of Shook in climbing upon it? Answer. Yes."

"7. Was the immediate and proximate cause of the plaintiff's injury the act of the man Shook getting upon the truck, causing it to fall and with the weight of his body roll against the plaintiff's leg? Answer. Yes."

In determining whether error was committed by the trial court in overruling the motion for judgment on these answers, this court will assume

3. in favor of the general verdict that every supposable fact legally admissible under the issues was proven in support of such verdict.

Meyers v. Winona, etc., R. Co. (1914), 58 Ind. App. 516, 106 N. E. 377; *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 103 N. E. 652. That we may know what might have been proven, we must look to the issues tendered by the pleadings. The averments of the amended complaint on which the cause was tried, affecting the questions presented by such answers to interrogatories, show that appellee had purchased a ticket entitling her to passage on one of appellant's trains, and hence had created between herself and appellant the relation of carrier and passenger; that after purchasing her ticket she started from the ticket office to the proper place to take her train; that she traveled the usual and ordinary course in going to the train and while so doing, and just after walking out of the door on the platform, "she was struck by a freight truck which was carelessly and negligently permitted by the servants and employes of appellant to stand against the wall, immediately east of the door of the waiting room, which then and there rolled out from said wall against appellee" and injured her; that such truck "was used in wheeling and transporting freight on the platform in that part of the station used for freight purposes"; that some time prior to the time appellee walked out of the door of the waiting room the servants and agents of appellant had carelessly and negligently leaned such truck against the side of the station, just east of the door in such a way that the same would be liable to roll out upon the platform and strike a passenger walking thereon, "and this plaintiff expressly charges that *said defendant company was negligent in placing said freight truck upon said platform in the manner aforesaid, and that the placing of said truck as aforesaid was the proximate cause of this plaintiff's said injuries.*"

In addition to a general denial, appellant filed an affirmative answer in which it admits its corporate existence, its business, etc., and avers in substance that it had a small ordinary baggage truck of standard make, describing it in detail, which was being used in the regular business of the company on said day; that the agent of the company using such truck leaned it against the depot building in a careful manner, and so that it would constitute no danger whatever to passengers or any one on the platform; that while it was so standing or leaning against the building a Mr. Shook, who was forty-seven years of age and a wholly responsible agent, not in the employ of appellant, was upon the depot platform of his own volition as an idler, having no business or relation whatever with appellant; that the agents of appellant had no knowledge of Shook's presence; that Shook, of his own volition, without any direction of any agent of appellant, and without the knowledge of such agent, but simply as a meddler, climbed upon the truck as it leaned against the building, with his feet resting upon the iron guard at the end thereof next to the floor of the platform and just above the wheels, and leaned his body back against the truck, and while so situated, by motion of his body, caused the truck to slip and the wheels thereof to move forward, and caused the truck with the weight of his body thereon to strike appellee as described in the complaint; that the injury occurred wholly as stated herein and not otherwise. To this affirmative answer there was a reply in general denial. The verdict is a finding in favor of the averments of the complaint

4. and against those of the affirmative answer that are in conflict with the former.

Appellant's contention that judgment should have been rendered on said answers to interroga-

tories is based mainly on the answer to interrogatory No. 7. It is insisted in effect that this answer shows that the immediate and proximate cause of appellee's injury was the act of Shook, and that appellant's act, even if negligent, only created a condition; that an intervening responsible agent broke the line of causation between such condition and appellee's injury. As applicable to this contention this court in the case of *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 403, 404, 97 N. E. 822, 827, said: "If the agency intervening was one over which the original tortfeasor had no control, and which was not put in motion by the original wrongful act; and if the character of the intervening agent, and the manner of the intervention, were such as, under the circumstances, could not reasonably have been expected to occur in the ordinary course of nature and according to common experience, then such independent agency so intervening will be treated as the sole proximate cause, and the original wrongful act will be treated as only a condition."

If by interrogatory No. 7 it was desired to foreclose and conclusively settle the question of the sole cause of appellee's injury, the propounder thereof was unfortunate in the selection of the language employed for such purpose. If the jury had in fact been asked if it found that Shook's act was the sole cause of appellee's injury, and in response had answered, "Yes", a very different question would have been presented for our consideration from that which is now presented by the record. As above indicated, it is the duty of the court to

5. reconcile such answers with the general verdict if possible, and to such end the court should not single out a particular interrogatory and answer, and consider it separate and apart

from the others, but should consider all of the interrogatories and answers together, in connection with any and all facts favorable to the general verdict that might have been legally proven under the issues, and if, when so considered, there is a reasonable possibility of reconciliation between such answers and the general verdict, the latter must stand. Applying this test to the interrogatories and answers, *supra*, it seems to us

6. there is little ground for appellant's contention that the general verdict must fall before them. There is no finding by the jury that Shook caused the truck to fall, or that such acts were the *sole* proximate cause of appellee's injury; and, in any event, appellant might have reasonably foreseen and anticipated that its truck, left in the position it was, would be, or by the unintentional movement or act of some third person, might become a menace to the life and limb of passengers on its platform. By answer to interrogatory No. 6, the jury expressly finds that the presence or position of the truck on the platform constituted a danger independent of the act of Shook in climbing on it, and the general verdict is a finding that appellant was guilty of the negligent act charged in the complaint and that such act was an original proximate cause of appellee's injury. The answer to No. 7, when read in the light of such other answer and facts is no more than a finding that Shook's act was also a cause, proximate in character, and immediate in point of time, which concurred with the original cause in producing appellee's injury; that the injury was the result of a combination of said causes concurring at the time of the injury, each operating to produce it, and without either it would not have resulted. Such being the possible effect of said

Lake Erie, etc., R. Co. v. McConkey—62 Ind. App. 447.

answers, they are not necessarily contradictory to, or inconsistent with, the general verdict.

"It is no defense in an action for a negligent injury, that the negligence of a third person, or an inevitable accident, or an inanimate thing,

7. contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause of the injury. * * * In such cases, the fact that some other cause operates with the negligence of the defendant in producing the injury, does not relieve the defendant from liability.

* * * His original wrong, concurring with some other cause and both operating proximately, at the same time in the production of the injury, he is liable to respond in damages whether the other cause was a guilty or innocent one. In cases of this character the negligence of two independent persons may concurrently result in injury to a third, in which event the injured party may maintain his action against either or both of the negligent parties." 16 Am. and Eng. Ency. Law 440-443; *Louisville, etc., Ferry Co. v. Nolan* (1893), 135 Ind. 60, 67, 34 N. E. 710. See, also, *Belt Railroad, etc., Co. v. McClain* (1914), 58 Ind. App. 171, 106 N. E. 742; *Indianapolis, etc., R. Co. v. Waddington* (1907), 169 Ind. 448, 463, 82 N. E. 1030; *Baltimore, etc., R. Co. v. Kleespies* (1906), 39 Ind. App. 151, 164, 76 N. E. 1015, 78 N. E. 252; *Anderson v. Evansville, etc., Ass'n* (1911), 49 Ind. App. 403, 97 N. E. 445; 3, 8 Thompson, Negligence (2d ed.) §2779. Under these authorities, appellant was not relieved from liability herein by reason of Shook's act, though it concurred with appellant's negligence in producing the injuries for which the action herein was brought, and the judgment appealed from rendered.

By our disposition, *supra*, of the question presented by the ruling on appellant's said motion for

judgment, while we have assumed and treated interrogatory No. 7 as though it were a proper

8. interrogatory, we have not thereby intended to hold that it was proper in fact. It is insisted by appellee that the interrogatory is improper because it calls for a legal conclusion. It is true that an answer to such interrogatory to be correct and proper, within the meaning of the law, would involve the knowledge and application of the legal definition of proximate cause, and hence involves a legal conclusion. *Dodge Mfg. Co. v. Kronewitter* (1914), 57 Ind. App. 190, 199-200, 104 N. E. 99; *Terre Haute, etc., Traction Co. v. Hunter* (1916), 62 Ind. App. 399, 111 N. E. 344, 350; *Southern R. Co. v. Utz* (1912), 52 Ind. App. 270, 275-277, 98 N. E. 375.

No reversible error being shown the judgment below is affirmed.

NOTE.—Reported in 113 N. E. 24. Effect of concurring negligence of a third person upon the liability of one sued for negligently causing injury, 17 L. R. A. 33; 29 Cyc 497. Duties of railroad companies as to stations, platforms and approaches, 29 Am. St. 55. See under (6) 38 Cyc 1927, 1930.

ROBINSON v. HORNER.

[No. 8,944. Filed June 22, 1916.]

1. APPEAL.—*Briefs.—Questions Presented.*—Where appellant's brief fails to comply with Rule 22, clause 5, of the Supreme and Appellate Courts requiring "a concise statement of so much of the record as presents every error and exception relied on", but does set out the motion for a new trial, containing the grounds assigned therefor, and under the "Points and Authorities" the brief states several abstract propositions of law without attempting to apply them, as the rule of the court provides, to any particular ruling of the trial court, except to state that the decision of the court is not sustained by sufficient evidence, the sufficiency of the evidence is the only question presented for consideration. p. 458.
2. APPEAL.—*Review.—Questions of Fact.—Conflicting Evidence.*—While §698 Burns 1914, Acts 1903 p. 341, requires the Supreme

and Appellate Courts to consider and weigh the evidence, if required by the assignment of errors, yet, where the evidence is in part oral and there is a conflict therein, it will not be weighed by the reviewing court. p. 459.

From Tippecanoe Superior Court; *Isaac B. Schoonover*, Special Judge.

Action by Alfred C. Robinson against Cornelius M. Horner. From a judgment for defendant, the plaintiff appeals. *Affirmed*.

C. Robert Pollard, Charles R. Pollard, Charles E. Thompson and Charles V. McAdams, for appellant.

Stuart, Hammond & Sims and Emory B. Sellers, for appellee.

McNUTT, J.—This is a second appeal of this case. The action was begun in the White Circuit Court in the September term, 1904, and the venue changed to the court below. Appellant withdrew his first paragraph of complaint, and a demurrer was sustained to each of the remaining two paragraphs. By leave of court, the plaintiff filed what is termed a second amended third paragraph of complaint, to which a demurrer was sustained. Thereupon appellant refused to plead further, and elected to stand upon the second paragraph and the second amended third paragraph of his complaint. Judgment was rendered against appellant from which he appealed to this court. The cause was transferred to the Supreme Court, which held that the lower court erred in sustaining the demurrer to each of said paragraphs, holding that each of said paragraphs stated a cause of action against appellee, the court saying: "The character of this action and the theory upon which the complaint proceeds is a suit in equity by one partner to compel his co-partner to account. We think that each of the paragraphs to which a demurrer was sus-

tained was sufficient in facts to put appellee upon his answer, and that the court therefore erred in sustaining a demurrer thereto." *Robinson v. Horner* (1911), 176 Ind. 226, 234, 95 N. E. 561.

To this complaint appellee filed an answer in two paragraphs: (1) A general denial; (2) an answer of settlement of the affairs of the partnership, and a payment by appellee to appellant of the full amount of plaintiff's interest in said partnership business before the bringing of this action. The issues were closed by a reply by appellant to the second paragraph of answer in general denial.

Appellant assigns in this court two errors, one of which is the overruling of his motion for a new trial.

Appellant has no heading of, "A concise

1. statement of so much of the record as presents every error and exception relied on," in his brief, as provided by clause 5, Rule 22, of this court, but he does set out his motion for a new trial, which contains separate grounds or reasons therefor. In that part of his brief under "Points and Authorities", appellant states seven abstract legal propositions, which may have some application to one or more of the rulings assigned as error, and intended to be relied on for a reversal; but no attempt is made to apply any particular one of the many assigned, as a cause for a new trial, except possibly "that the decision of the court is not sustained by sufficient evidence." "Mere abstract statements of law or fact, or both, unless applied specifically to some particular ruling or action of the court, although contained in appellant's statement of points, present no question." *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 627, 103 N. E. 652; *Leach v. State* (1911), 177 Ind. 234, 97 N. E. 792; *Pittsburgh, etc., R. Co. v. Lightheiser* (1906), 168 Ind. 438, 78 N. E. 1033; *Inland Steel Co. v. Smith*

(1906), 168 Ind. 245, 80 N. E. 538; *Weidenhamer v. State* (1913), 181 Ind. 349, 103 N. E. 413, 104 N. E. 577, and cases there cited; *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218, and authorities cited. Under said authorities, we must hold that the only question presented by appellant's brief is the one challenging the sufficiency of the evidence to support the decision of the trial court.

Appellee has filed a motion to dismiss this appeal because of the failure of appellant to comply with the first and fifth clauses of Rule 22 of the rules of this court in the preparation of his brief: First, in failing to state the nature of the action; and, second, in failing to refer in his points and authorities to a point or question arising in this case. This motion was filed on August 8, 1914. Action on the motion was by this court postponed until final hearing. Appellant has taken no steps to file a brief presenting other questions involved in his assignment of errors. We are of the opinion that appellant has, in substance, stated the nature of the action in his brief, but as heretofore stated, has made only one point, which he assigns in support of his motion for a new trial, namely, that the decision of the court is not sustained by sufficient evidence.

Appellant earnestly insists that it becomes the duty of this court to weigh the evidence introduced in this case as provided by the Acts of 1903

2. (Acts 1903 p. 341, §698 Burns 1914) which reads: "In all cases not now or hereafter triable by a jury, the supreme and appellate courts shall, if required by the assignment of errors, carefully consider and weigh the evidence and admissions heard on the trial when the same is made to appear by a bill of exceptions setting forth all the evidence given in the cause, and if on such appeal it appears from all the evidence and admissions

that the judgment appealed from is not fairly supported by, or is clearly against the weight of the evidence, it shall be the duty of the court to award judgment according to the clear weight of the evidence, and affirm the judgment or return said cause to the trial court with instructions to modify the judgment or to grant a new trial; or to enter such other judgment or decree as to such court of appeal may seem right and proper upon the whole case." This case comes within the provisions of said section of the statute. There are many decisions of the Supreme Court construing said section, and it has been decided that where the evidence is in part oral, and there is a conflict in such evidence, this court will not weigh the evidence. *Parkison v. Thompson* (1904), 164 Ind. 609, 73 N. E. 109, 3 Ann. Cas. 677; *Hudelson v. Hudelson* (1905), 164 Ind. 694, 74 N. E. 504; *Berkey, Gdn. v. Rensberger* (1911), 49 Ind. App. 226, 96 N. E. 32. A considerable part of the evidence upon which the decision of the trial court in this case was based was oral, and under said authorities we cannot weigh the evidence. It follows that the judgment must be affirmed

Judgment affirmed.

NOTE.—Reported in 113 N. E. 10.

GIBSON ET AL. v. BROWN ET AL.

[No. 8,594. Filed December 17, 1915. Rehearing denied June 2, 1916. Transfer denied June 23, 1916.]

1. WILLS.—*Construction.—Estate Devised.—Words of Inheritance.*—A devise of real estate in general terms, unaccompanied by words of inheritance or other language defining the quantity of the estate to be taken by the devisee, creates only a life estate under the rule of the common law which is in force in this state, but any additional language in the will indicating an intention to devise a fee simple will be given effect. pp. 466, 473.
2. WILLS.—*Construction.—Bequest of Personally.—Estate Granted.*

- A bequest of personal property in general terms, under both the common law and the rule in this state, is sufficient to give an absolute title. pp. 466, 473.
3. *WILLS.—Construction.—General Devise of Realty.—Estate Granted.*—A general devise of real estate, coupled with a general bequest of personal property, is sufficient to indicate an intention to devise the land in fee. pp. 466, 474.
 4. *WILLS.—Construction.—Rules.—Intention of Testator.*—In construing a will, rules of construction, as distinguished from absolute rules of law, must yield to the intention of the testator when expressed or otherwise ascertained in a proper manner. p. 466.
 5. *TRUSTS.—Nominal Trusts.—Statute.*—Under §4024 Burns 1914, §2981 R. S. 1881, a devise to a trustee, whose title is only nominal and who has no power of disposition or management of the lands devised is void as to the trustee and is to be deemed a direct conveyance to the beneficiary. p. 468.
 6. *WILLS.—Construction.—Partial Intestacy.*—The fact that a person makes a will is some evidence of a purpose to dispose of his entire estate, and, therefore, a construction that will result in partial intestacy is to be avoided, unless the language of the will compels such construction. p. 469.
 7. *ESTATES.—Life Estate.—Tenant a Trustee.*—A life tenant is a trustee for the remainderman in the sense that he must exercise reasonable precautions to preserve the property intact for transmission to the remainderman at the termination of the life estate, and he may not injure or dispose of it to his detriment. p. 470.
 8. *WILLS.—Construction.—Disinheritance of Heir.*—A will should not be so construed as to disinherit an heir unless such be the plain intention of the testator as gathered therefrom. p. 471.
 9. *WILLS.—Construction.—Estates Devised.*—Where a will, after directing that the testator's personal debts, funeral expenses, etc., be paid from personalty, provided that the widow take a life estate in the residue, both real and personal, and that at her death an equal division be made between a daughter and a son, designating the portion of the land the son should take, and providing that it be held by him not in fee simple, but in trust for the heirs of his body, held that, subject to the right of the testator's widow therein, the son took a life estate with the remainder to the heirs of his body, or an estate in fee tail, independent of §3994 Burns 1914, §2958 R. S. 1881, abolishing estates tail. p. 471.
 10. *WILLS.—Estates Tail.—Statutory Modification to Fee Simple.*—Under §3994 Burns 1914, §2958 R. S. 1881, providing that estates tail are abolished, and any estate which, according to the common law, would be adjudged a fee tail shall hereafter be adjudged a fee simple, and if no valid remainder be limited thereon shall be a fee simple absolute, where a testator devised an estate in fee tail to a son, the estate granted by the will, by reason of the statute, became an estate in fee simple in such son. p. 472.

From Steuben Circuit Court; *Louis B. Ewbank*, Special Judge.

Action by Hazel L. Gibson and others against Harry C. Brown and another. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

Bratton & Heckenlively and *Brown & Carlin*, for appellants.

A. C. Wood, Best & Yotter and *Hubbell, McInerny, McInerny & Yeagley*, for appellees.

CALDWELL, J.—Appellees joined in a demurrer to appellant Hazel L. Gibson's amended complaint, and also to the respective cross-complaints of the other appellants, Weir W., Gladys Rena and Orville W. McMillan. The demurrer to each pleading was sustained, and appellants refusing to plead over, judgment was rendered against them, from which they appeal, each assigning error on the sustaining of the demurrer to his pleading.

A review of the rulings of the court involves a construction of the last will and testament of Woster McMillan, in its relation to the nature of the estate in lands thereby created in his son, Alonzo C. McMillan. The complaint and cross-complaints to which demurrers were sustained are practically identical in facts alleged, and are substantially as follows: Woster McMillan died testate in Steuben County, in February, 1881, the owner in fee of the southeast quarter of section 13, township 36 north, range 13 east in said county. He left surviving him as his only heirs at law his widow, Mary McMillan, and his children, Mary E. Van Auken and Alonzo C. McMillan, who were also the children of Mary McMillan, his widow. His last will, omitting introductory and concluding matter, is as follows:

"I desire all funeral expenses and doctor bills to be paid from my personal property, all other demands are then to be paid in full. My accounts and debts are very few and I desire to have them all honorably and fully settled.

"The residue, both real and personal shall become the property of my companion, my kind, loving, faithful wife, Mary McMillan, for the term of her natural life. At her death, I desire an equal division to be made of it between my daughter, Mary E. Van Auken, and my son, Alonzo C. McMillan, and it is my desire further that the portion of realty that shall fall to the aforesaid Alonzo C. McMillan, shall consist of the west 80 of the southeast quarter of section thirteen (13) N. Range 13 east Tp. 36, and that it shall be held by him not in fee simple, but in trust for the heirs of his body. I desire this land to be divided by even acres without regard to cash value.

"I desire no litigation after my death with regard to the disposition of my property, and should any of the heirs and legatees under this will begin such proceedings, then that one shall forfeit all claims whatsoever, and not receive any benefit from any part of my estate."

It is further alleged that the widow, by regular proceedings, elected to take the provisions made for her by statute rather than under her husband's will. Thereafter at the September term, 1882, of the Steuben Circuit Court, she, as sole plaintiff, filed her complaint for the partition of the lands of which her husband died the owner, alleging in effect that she and her two children were the owners of such lands in equal parts in fee simple as tenants in common. She named as the only defendants to the proceeding, Mary E. Van Auken and husband and Alonzo C. McMillan and wife. The parties to this appeal were not parties to that proceeding. The action for partition resulted in a judgment that the

parties were the owners of the lands as alleged, and decreeing partition, whereupon there was set off to Alonzo C. McMillan as his one-third in value forty-eight acres off of the west side of the tract; to Mary E. Van Auken fifty-five acres off the east side, and the remaining portion to the widow. Alonzo C. McMillan, pursuant to the partition proceeding, took possession of the forty-eight acre tract, and thereafter, August 17, 1908, sold and by warranty deed, in which his wife joined, conveyed it to Maurice Lemmon for \$2,500 then paid. On April 10, 1910, Lemmon sold and by warranty deed, in which his wife joined, conveyed it to appellees for \$3,500 then paid. Appellees, by virtue of such conveyances, claim to own the tract in fee to the exclusion of appellants. It is further alleged that when Woster McMillan executed his will, Alonzo C. McMillan, Jane, his wife, and Orville W. McMillan, their only child, who was born in 1879, lived with Woster McMillan and his wife on the lands described in the will, and that Woster McMillan knew of the existence of Orville W. McMillan. The widow, Mary McMillan, and Jane, the wife of Alonzo C. McMillan, each died in 1883. Alonzo C. McMillan remarried in 1887, and there were born to him, as fruits of such marriage, the appellants, Hazel L. McMillan, now Hazel L. Gibson, Gladys Rena McMillan and Weir W. McMillan, the last two being less than twenty-one years of age. Alonzo C. McMillan died January 17, 1911, leaving surviving him as his only heirs at law, his children, the appellants, and his widow, Dora McMillan, mother of appellants other than Orville W. McMillan.

The respective pleadings of appellants contain the following further allegations by way of deduction from facts averred: Hazel L. Gibson alleges

that she owns the forty-eight acre tract in fee, and that Alonzo C. McMillan, under his father's will, held only in trust for her use and benefit. Orville W. McMillan alleges that the trust was for the benefit of himself and his coappellants, as heirs of the body of Alonzo C. McMillan. He asks, however, in his prayer for relief, that the court adjudge that he is the owner of the entire tract, and that Alonzo C. McMillan held it in trust for his sole use and benefit. Weir W. McMillan alleges that he is the owner of the undivided one-fourth of the tract, and that Alonzo C. McMillan held it in trust for him and his coappellants as heirs of his body. The concluding averments of the cross-complaint of Gladys Rena McMillan are similar to those of Weir W. McMillan. The prayer is to quiet title in harmony with the respective allegations. The parties concede that the lands described in the will are the lands alleged to have been owned by Woster W. McMillan at the time of his death.

Proceeding to construe the will, the testator, having provided for the payment of debts and expenses, bequeathed the residue of his personal property and also devised his real estate, or the residue thereof, if any portion of it should be used in the payment of obligations, to his wife for the period of her natural life. The will then proceeds as follows: "At her death, I desire an equal division to be made of it between my daughter, Mary E. VanAuken, and my son, Alonzo C. McMillan, and it is my desire further that the portion of realty that shall fall to the aforesaid Alonzo C. McMillan shall consist of the west 80," etc. Considering the language last quoted, disassociated from what follows, and there arises sufficient uncertainty in the mind of a prudent person respecting the quantity

of the estate in lands thereby devised to call for further consideration and possibly for explanation. Such uncertainty involves only whether such estate is in quantity for and during the life of the devisee or in fee simple. Thus the devise is in general terms unaccompanied by words of inheritance or

1. other language defining the quantity of the estate to be taken by the devisee. Under such circumstances, the common-law rule that the devisee takes only a life estate is in force in this state. *Cleveland v. Spilman* (1865), 25 Ind. 95; *Mulvane v. Rude* (1896), 146 Ind. 476, 45 N. E. 659. However, if the will contains any expression in addition to the language of the general devise indicating an intention to pass a fee simple, the courts will give effect to such expression to carry out the intention of the testator. *Roy v. Rowe* (1883), 90 Ind. 54; *Fenstermaker v. Holman* (1901), 158 Ind. 71, 62 N. E. 699; *King v. Ackerman* (1862), 2 Black (67 U. S.) 408, 17 L. Ed. 292, and note. There is also a statute to that effect. §3123 Burns 1914, §2567 R. S. 1881. *Skinner v. Spann* (1911), 175 Ind. 672, 93 N. E. 1061, 95 N. E. 243. A bequest of personal property in general terms, both at common law, and also
2. as announced by the courts of this State, is sufficient to give an absolute title, and, where a general devise of real estate is coupled with
3. a general bequest of personal property, such fact is sufficient to indicate an intention to devise the lands in fee. The same language is used here is disposing of the residue of the estate, real and personal, considering only the quoted portions of the will now under consideration. *Heilman v. Heilman* (1891), 129 Ind. 59, 28 N. E. 310; *Mulvane v. Rude*, *supra*. The rules under consideration are rules of construction rather than absolute rules of law, and as a consequence they must yield to the intention of the testator when

expressed or otherwise ascertained in a proper manner. *Skinner v. Spann, supra*.

Proceeding with the analysis, the only possible controversy that could arise from a consideration of the quoted provision of the will now under consideration involving the nature of the interest or estate in lands thereby created is, as we have indicated, respecting the quantity of such interest or estate; that is, whether the estate thereby devised to Alonzo C. McMillan is for life or in fee. In such quoted language there is no suggestion of an estate or interest in trust as distinguished from one devised to Alonzo C. McMillan as an individual. The thought in the testator's mind may thus be traced through the will: "In creating an estate in behalf of my son, I have used language indicating a plain intention that the quantity of such estate shall be either for life or in fee, but perhaps I have left it uncertain as to which is my purpose. I must remove this uncertainty by some appropriate expression. I shall say plainly that I do not intend for it to be a fee." He then, by the next expression in his will, gives life to such intent. This expression is as follows: "And it shall be held by him not in fee simple." The antithesis of an estate in fee simple is some estate less in quantity. The antithesis of an estate devised in trust is one devised for the individual or personal use and benefit of the devisee. As we have said, the language of the will first quoted and discussed carries with it no suggestion of an estate in trust. It suggests only an estate for the personal benefit of the devisee. If the testator in fact had in mind that the estate created should be in trust for the use of others, and if it was his purpose so to declare, and to preface his declaration with eliminating language, he did not use apt words to that end. If it was his purpose to create an

estate in which his son should have no personal interest, but which he should hold only in trust for others, it would be reasonable to presume that he would have eliminated the antithesis of such estate in trust plainly indicated by the antecedent expression. Such antithesis is, as we have said, an estate personal to the son. If he desired to use language of exclusion, he should have said: "And that it shall be held by him not for his individual use and benefit." He did say, "and that it shall be held by him not in fee simple." It therefore follows that in our judgment the fact of the negating of the one possible quantum of estate suggested by the preceding language is equivalent to affirming the other; that the express exclusion of an estate in fee shows by implication an intent to create in the son the only other estate as to quantity that may be gathered from the antecedent language; that negating a purpose to devise in fee is equivalent, under the circumstances, to affirming a purpose to devise for and during the life of the son; that it is a case of affirmation by exclusion. Life estates sometimes result from implication. See cases collected in note to *Hamilton v. Sidwell* (1909), 29 L. R. A. (N. S.) 961, 1003; also, 2 Fearn, Remainders §463.

The entire expression in which is included the language eliminating a purpose to create an estate in fee, is as follows: "And that it shall be held by him not in fee simple, but in trust for the heirs of of his body." Section 4024 Burns 1914, §2981 R. S.

1881, is as follows: "A conveyance or devise

5. of lands to a trustee whose title is nominal only and who has no power of disposition or management of such lands is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary." If by the concluding part of the language last quoted from the will, the testator

intended to create a trust of which others should be the exclusive beneficiaries, and of which the son should be merely the trustee rather than that he as an individual should have an interest or estate in the property involved, then under the statute, since no power of disposition or management is conferred upon the trustee, the trust is nominal, and therefore void as to the trustee. *Allen v. Craft* (1887), 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425; *Stroup v. Stroup* (1895), 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523.

Assuming that the testator attempted to create an express trust in the lands for the use of the beneficiaries to whom reference is made as "the heirs of his body," and that such trust is void as to the trustee, and that the devise is therefore direct to the beneficiaries of the trust, still the language eliminating an estate in fee simple must be reckoned with. As in case of an individual ownership, trust estates are not necessarily uniform in quantity. Estates in fee simple for the life of the beneficiary or another, or for a term of years, may be held in trust. We should thus have an attempt to create a trust estate in lands less in quantity than a fee, the trust being executed by virtue of the statute, and the estate less in quantity than a fee simple passing direct to the beneficiaries. Under such an interpretation of the will, the fee is not devised. It results that there would be a partial intestacy. The

fact that a person makes a will is some evi-

6. dence of a purpose to dispose of his entire estate, and it therefore follows that a construction that will result in partial intestacy is to be avoided, unless the language of the will compels such construction. *Cate v. Cranor* (1868), 30 Ind. 292; *Myers v. Carney* (1908), 171 Ind. 379, 84 N. E. 400; *Barker v. Town of Petersburg* (1907), 41 Ind.

App. 447, 82 N. E. 996. There is a sense in which a life tenant is trustee for the remainderman. While

he is entitled to the possession of the lands

7. involved, and may use them for his own benefit, and appropriate to himself the proceeds arising from such use, still he holds the corpus of the estate in trust in the sense that he must exercise reasonable precautions to preserve the property intact for transmission to the remainderman at the termination of the life estate, and may not injure or dispose of it to his detriment. 16 Cyc 616. If, therefore, we assume that the intent of the testator as gathered from the will was to devise to the son an estate for and during his natural life, with remainder in fee to the heirs of his body, harmony results. Such a construction is consistent with the language that the devise was not to be in fee simple; that is, that the testator intended that the estate devised to the son was not to be in fee, but that it should be for his natural life. It is consistent with the language that the estate was to be held in trust, since, as we have indicated, the life tenant holds the body of the estate in trust for the remainderman or reversioner. In addition, such a construction results in full testacy. Moreover, while we are not informed as to the amount or value of the personal estate, there are some indications in the will that the testator doubted that there would be any portion of it remaining, after the payment of expenses, for transmission to the beneficiaries. Thus, he provided that the funeral expenses and doctor bills should be paid from the personal property, and that other debts should be paid generally. While he speaks of a possible surplus of personal property, the devise of real estate is of the residue thereof. Any other construction of the will than that we have indicated, would result in the son's interest

being limited to the undivided one-half of the personal property after the payment of expenses, and subject to the widow's life interest therein.

A will should not be so construed as to disin-

8. herit an heir unless such be the plain intention of the testator as gathered therefrom. *Butler v. Moore* (1884), 94 Ind. 359.

Thus arriving at the intent of the testator from a consideration of his will, we conclude that that instrument must be interpreted as if the lands

9. involved, subject to the life estate of the widow, were devised to the son for and during the period of his natural life, and at his death to the heirs of his body. If we are correct thus far in our interpretation of the will, we have yet to determine what quantity of estate was thereby devised to the son, and this requires that we ascertain the sense in which the phrase "the heirs of his body", as found in the will, is used. Where either the term "heirs" or "heirs of his body" is used in a will, there is a presumption that such term is used in its technical sense, and as words of limitation, defining the quantity of the estate devised, rather than as words of purchase. This presumption can be overcome only by some qualifying or explanatory word or expression indicating that the testator intended to use the term in a popular or other than a technical sense. The phrase "the heirs of his body" as found in the will here, is used without limitation, explanation or qualification. There is nothing in the will, or any part thereof, that throws any light upon the question of the meaning intended to be assigned to such phrase, save and except what may be ascertained from the fact that such phrase is found in the will. There is no independent devise to "the heirs of his body" and no independent language is directed to the creating of an estate

for the class of persons so designated. The language that creates an estate in the son creates also in the class of persons so designated, whatever estate, if any, such class takes under the will. We therefore, hold that, independent of our statute, the will here devised to Alonzo C. McMillan an estate in fee tail in the lands involved. *Waters v. Lyon* (1895), 141 Ind. 170, 40 N. E. 662; *Teal v. Richardson* (1902), 160 Ind. 119, 66 N. E. 435; *Lane v. Utz* (1892), 130 Ind. 235, 29 N. E. 772; *King v. Rea* (1877), 56 Ind. 1; *Chamberlain v. Runkle* (1901), 28 Ind. App. 599, 63 N. E. 486; *Shimer v. Mann* (1885), 99 Ind. 190, 50 Am. Rep. 82; *Hamilton v. Sidwell* (1909), 131 Ky. 428, 115 S. W. 204, 29 L. R. A. (N. S.) 961, and notes at 1039, 1059, 1069, 1073.

Section 3994 Burns 1914, §2958 R. S. 1881, is as follows: "Estates tail are abolished; and any estate which, according to the common law, would

be adjudged a fee tail shall hereafter be

10. adjudged a fee simple; and if no valid remainder be limited thereon shall be a fee simple absolute." By virtue of the statute, the estate in fee tail so created in Alonzo C. McMillan became a fee simple. We therefore hold that the testator's will here created in Alonzo C. McMillan an estate in fee simple in the lands involved. See authorities last cited.

Woodrum v. Kirkpatrick (1852), 2 Swan (Tenn.) 218, is in point on a number of questions involved here. There the testator provided by his will that certain chattel property should be divided equally among his children, and that "the portions or lots which are or may be assigned to * * *, my daughters, shall be held by them for the benefit of the heirs of their bodies, not subject to be sold, bartered or traded by their husbands." In holding that the

daughters took the absolute title, rather than merely as trustees, the court says: "We cannot assent to the argument that the testator intended to convey the property to his daughters merely as trustees, to hold for the benefit of their children, giving them no estate whatever in their own right.

* * * We cannot give any more force to the words 'to be held by them for the benefit of the heirs of their bodies; than we would in the words 'to be held by them and the heirs of their bodies,' or, 'to go to the heirs of their bodies.' In either event, whatever might be the intention of the testator, the case would fall within the rule in the case of *Polk v. Faris* (9 Yerg. [Tenn.] 210, 30 Am. Dec. 400) and the first taker would be vested with the absolute interest."

The judgment is affirmed.

ON PETITION FOR REHEARING.

CALDWELL, C. J.—An examination of the briefs filed in support of plaintiff's petition for a rehearing convinces us that we did not succeed in making ourselves entirely clear in some phases of the original opinion. Certain language of the will considered apart from what follows, in effect devises and bequeaths to Alonzo C. McMillan the undivided one-half of the residue of the real and personal estate of the testator. As indicated in the original opinion, such language constitutes a general devise of such real estate, and it is therefore

1. sufficient of itself to create in him an estate in lands only for the period of his natural life. Being coupled with a general bequest of
2. personal property, however, the power of the language of the general devise is augmented to the extent that, severed from the language immediately following, it is sufficient to create a

fee, the contrary not appearing. The rule that the fact that language bequeathing personal property in general terms is coupled with language devising real estate in general terms increases the power of the latter, is a mere rule of construction

4. that readily yields to a clearly expressed contrary intention. Such clearly expressed contrary intention is indicated by the language immediately following, to wit: "And that it shall be held by him not in fee simple." Our analysis is to the effect that the testator devised real estate by the use of words, which under the common-law rule in force in this State, of themselves create but a life estate; but by recourse to such rule of construction, we should be compelled to say that a fee rather than a life estate was intended. However, the language immediately following, as above quoted, being plain and unmistakable, it becomes both unnecessary and improper to apply such rule of construction. It follows that the language of the devise must be held within the limits of its common-law potency, and that, considered in connection with the language quoted, it is sufficient to create but a life estate. It is probably more apt to state that a life estate results from construction rather than implication as expressed in the original opinion.

We do not overlook the fact that the language of the will is "not in fee simple, but in trust" etc., and that such language apparently creates an antithetic relation between an estate in fee simple and an estate in trust. Such conclusion, however, results only from a superficial examination of such language, disassociated from what precedes it. An estate in trust is not and can not be made the antithesis of an estate in fee simple. The one expression has reference to the quality of the estate;

the other to its quantity. The expression "fee simple" defines the quantity of the estate, regardless of whether it is owned individually, or held for the use and benefit of another, while an estate in trust may in quantity be a fee simple, for life or for a term of years. The provision for the division of the residue between Alonzo C. McMillan and his sister imports an estate for the individual benefit of each. There follows a clause specifying the tract devised to the former. Individual benefit is still indicated. Under the circumstances, we are firmly of the opinion that if the testator intended to create an estate in trust, rather than an estate for the benefit of Alonzo, the language "and that it shall be held by him not in fee simple" is very inapt. We adhere to our original conclusion as to the nature of the estate created.

However, a deduction conditionally made by the original opinion to the effect that any other interpretation of the will than as therein and herein indicated would result in partial intestacy, is possibly not justified. On the assumption that the testator intended to create an estate in trust rather than an estate for the individual benefit of Alonzo C. McMillan, the phrase "not in fee simple" should probably be held not to reduce the estate imported by the preceding language, but rather as used antithetically to the phrase, "but in trust." On such assumption, the estate in trust, if created, would be in quantity a fee. Such assumption, however, as we have indicated, is not allowable. In effect, we applied the rule in Shelley's Case in the original opinion in arriving at the conclusion that the will created in Alonzo C. McMillan an estate tail, and that such estate, by virtue of the statute, became a fee simple. It follows that the argument that we ran counter in part to the actual

intent of the testator is not effective. Every devise coming within the rule in Shelley's Case is controlled by it, even though the actual intent of the testator is thereby thwarted. *Bonner v. Bonner* (1901), 28 Ind. App. 147, 62 N. E. 497; *Hamilton v. Sidwell*, *supra*, note p. 1039.

Petition for rehearing overruled.

NOTE.—Reported in 110 N. E. 716, 112 N. E. 894. See under (1), (3) 40 Cyc 1575, 1577; (2) 40 Cyc 1607; (9), (10) 40 Cyc 1595-1602.

CROUCH ET AL v. SHANTZ ET AL.

[No. 9,529. Filed June 23, 1916.]

1. **APPEAL.—Perfection of Appeal.—Time.—Statute.**—Where appellants filed their transcript on appeal on the sixty-first day after the filing of the appeal bond, the preceding day being Sunday, it was filed in time, since §1350 Burns 1914, §1280 R. S. 1881, concerning the computation of time in such cases, provides that if the last day falls on Sunday it shall be excluded. p. 478.
2. **APPEAL.—Procedure.—Necessary Parties.**—In a suit to foreclose a mortgage, even though it appeared that the plaintiffs filed an admission that one of the defendant mortgagors was of unsound mind when the mortgage was executed and not liable, and there was a judgment for costs in favor of defendants, such insane defendant was interested in supporting the judgment within the meaning of §674 Burns 1914, Acts 1899 p. 5, concerning notice of appeal, and a necessary party to a vacation appeal, and failure to give her notice or make her a party or to furnish a bond inuring to her benefit necessitates a dismissal of the appeal. p. 479.
3. **NEW TRIAL.—When Proper.—Parties.**—Where, in an action to foreclose a mortgage, plaintiffs filed a written admission that as to one of the defendants there was no liability and there was a judgment for costs in favor of all defendants, no error can be predicated on the trial court's action in overruling a motion for a new trial directed at the entire judgment. p. 481.

From St. Joseph Superior Court; *George Ford*, Judge.

Action by Jephtha Crouch and others against J. Milton Shantz and another. From a judgment for defendants, the plaintiffs appeal. *Appeal dismissed.*

Martin A. Quinn, Farabaugh & Hagerty and Proctor & Crawley, for appellants.

Lenn J. Oare, Russell W. Geyer and Ernest M. Morris, for appellees.

HOTTEL, P. J.—Appellants filed a complaint in the court below to recover on four promissory notes and to foreclose a mortgage given to secure them. Appellee J. Milton Shantz filed an answer of general denial and three paragraphs of counterclaim. A reply of three paragraphs was filed. Appellee Mary E. Shantz was found to be insane and a guardian *ad litem* was appointed and filed for her an answer in three paragraphs, the first of which was a general denial. To the second and third paragraphs of such answer there was a reply of general denial.

A trial by the court resulted in a judgment that appellees recover of the appellants their costs and that appellants take nothing on their complaint. A motion for new trial was filed against both judgment defendants and overruled. The only error assigned and relied on in this court that is not expressly waived is the overruling of such motion.

Appellees enter a special appearance in this court and file a motion to dismiss the appeal based on the following grounds: “(1) That the appeal bond in this case was filed on December 15, 1915, the transcript in this appeal was not filed in the office of the clerk of the Appellate Court until the 14th day of February, 1916, being sixty-one days after the filing of the appeal bond and that appellants have taken no steps to perfect a vacation appeal. (2) That the appellee, Mary E. Shantz, was a party to the judgment in the court below and that she was not named as an obligee in the appeal bond and no steps were taken by appellants to perfect a vacation appeal.”

In their discussion of the first ground of the motion to dismiss, appellants concede that their appeal bond was filed in the trial court December 15,

1. 1915; that the transcript was not filed in the office of the clerk of this court until February 14, 1916; that under §1350 Burns 1914, §1280 R. S. 1881, providing that in the computation of time in such cases the first day is excluded and the last day included, such transcript was not filed until the sixty-first day after the filing of such bond, which they also concede would not be in time but for the last clause of §1350, *supra*, which provides that "*if the last day falls on Sunday it shall be excluded.*"

Reference to the calendar discloses that February 13, 1916, which was the sixtieth day after the filing of such bond, was Sunday. It follows that under the provisions of the statute, *supra*, the transcript was filed in time. In the case of *Kinney v. Heuring* (1908), 42 Ind. App. 263, 85 N. E. 369, this court expressly held that where the year for filing a transcript expired on Sunday, the filing thereof on the following Monday was in time. The case of *Board, etc. v. Tincher, etc., Co.* (1911), 49 Ind. App. 221, 97 N. E. 22, is, by inference at least, a holding to the same effect.

In the discussion of the second ground of appellees' contention, appellants concede that Mary E. Shantz was a party to the judgment appealed from; that she was not named as an obligee in the appeal bond and that appellants have given her no notice of the appeal. They also, in effect, concede that every party who has an interest that the judgment appealed from be maintained is a necessary party to the appeal. They make no claim that they have made any effort to perfect a vacation appeal, and rest their claim that the appeal should not be dismissed solely upon the ground that Mary E. Shantz

is not a necessary party to the appeal because she has no interest in maintaining the judgment of the lower court. They, in effect, concede that this contention is not supported by the judgment itself; that the record shows a judgment in Mrs. Shantz's favor; and that looking to the judgment alone she appears to be interested in maintaining it. They insist, however, that she in fact is not interested in supporting the judgment within the meaning of §674 Burns 1914, Acts 1899 p. 5, and hence is not in fact a necessary party to the appeal. This contention is based upon the fact that at the close of their evidence in chief, appellants made the following admission which is disclosed by the record, viz.: "It is admitted by the plaintiffs in this action that there may be a finding that the co-defendant, Mary E. Shantz, was of unsound mind at the time she executed the mortgage sued on and that therefore the mortgage has no force and effect as to her interest in the real estate, described in the complaint."

We can not give to this admission the effect which appellants insist should be given to it. The

effect of their contention is that this admission shows that they had no controversy with the appellee Mary E. Shantz, and that its effect should be the same as though they had dismissed their action against her and the judgment had been taken against her co-appellee alone. Several cases are cited and relied on by appellants which support their contention, if we give to the admission, *supra*, the effect which appellants claim for it; that is to say, cases are cited in which parties, who, in the trial court had disclaimed any interest in the matter in litigation, were held to be unnecessary parties on appeal. Likewise parties against whom the action had been dismissed in the

trial court, and no judgment rendered against them, were held to be unnecessary parties on appeal.

Appellant's mistake is made in assuming that the agreement here made should have the effect of a disclaimer of any cause of action against appellee, or the effect of a dismissal as to her, or that in the light of such admission the judgment here rendered should be treated the same as though no judgment had been rendered in Mrs. Shantz's favor. None of the authorities cited lend any support to this contention and all of such authorities by implication, at least, support the general rule that in an appeal under the general statute providing for a vacation appeal, all parties to the judgment appealed from must be made parties to the appeal in the assignment of error and proper notice of the appeal given. For cases announcing such general rule, see *Lauster v. Meyers* (1908), 170 Ind. 548, 549, 84 N. E. 1087, and cases cited; *Pope v. Voigt* (1911), 49 Ind. App. 176, 96 N. E. 984. The effect of appellant's admission was simply to supply the evidence which authorized the judgment in Mary E. Shantz's favor and, such a judgment having been rendered, the record presents a case very different from what would have been presented, if as to her the action had been dismissed and no judgment taken against her. If the wording of the bond was such as to show an intention to appeal from the entire judgment, and that it in fact was intended as indemnity for both appellees, this court might so treat it, but the wording of the bond itself and appellants' contention here in this court, show conclusively that the bond was never intended to inure to the benefit of Mary E. Shantz, and, so far as she is concerned, no bond had been given and hence a term time appeal has not been perfected as to her. As before stated, there is no claim that any steps have been taken to

Hillel v. Julius H. Buettner Furn., etc., Co.—62 Ind. App. 481.

perfect a vacation appeal. However, if the appeal had been perfected as to Mrs. Shantz, there could be no reversal of the judgment in this case. As before stated, the only assigned error presented by appellant's brief is that challenging the action of the trial court in overruling their motion for new trial, and in such motion appellants asked a new trial as against both appellees.

The admission entered of record above indicated, on which they rely to prevent the dismissal of the appeal, conclusively shows that, as against

3. Mrs. Shantz, appellants were not entitled to a new trial, and hence no error available in this court can be predicated on the court's action in overruling such motion. *Hatfield v. Rooker* (1913), 56 Ind. App. 1, 6, 7, 104 N. E. 798, and cases there cited.

For the reasons indicated the appeal should be and is dismissed.

NOTE.—Reported in 113 N. E. 13. Rules for the computation of time when first or last day falls on Sunday, 49 L. R. A. 204; 15 L. R. A. (N. S.) 687; 38 L. R. A. (N. S.) 1162; 78 Am. St. 377; 38 Cyc 329. See under (2) 2 Cyc 764; 3 C. J. 1014.

HILLEL v. JULIUS H. BUETTNER FURNITURE AND CARPET CO.

[No. 9,050. Filed June 23, 1916.]

1. **NEW TRIAL.**—*Specification of Grounds.*—*Statute.*—That the judgment is clearly against the weight of the evidence is not a statutory ground for a new trial under §585, cl. 6, Burns 1914, §559 R. S. 1881, and such specification, therefore, presents no question for review. p. 483.
2. **APPEAL.**—*Presenting Grounds of Review.*—*Specification of Grounds.*—In assigning as a ground for a new trial, where the cause has been tried by the court, that the "finding" is not sustained by the evidence, the use of the word "finding" is equivalent to the word "decision" used in the statute (§585, cl. 6, Burns 1914, §559

Hillel v. Julius H. Buettner Furn., etc., Co.—62 Ind. App. 481.

R. S. 1881), so that such specification of a ground for a new trial properly presents for review the question of the sufficiency of the evidence. p. 483.

3. NEW TRIAL.—*Specification of Grounds.—Insufficiency of Evidence.*—An assignment that the decision “is not sustained by the evidence,” is in effect equivalent to an assignment that the decision “is not sustained by sufficient evidence.” p. 483.
4. SALES.—*Conditional Sale.—Breach.—Recovery.—Sufficiency of Evidence.—Admissibility of Evidence.*—In an action in replevin, there was evidence to the effect that the defendant had in her possession certain household furniture which she knew her deceased husband had purchased under a conditional contract retaining title in the vendor and giving him the right of possession on default in the stipulated payments or upon removal of the goods from the then residence of the vendee; that the husband was in default in payments at the time of his death; that none were made by the defendant thereafter; and that she had removed the goods from the original residence of the husband. *Held*, that the contract of sale was properly received in evidence, and that the evidence was sufficient to sustain the decision of the trial court for the plaintiff. p. 483.
5. REPLEVIN.—*Right of Action.—Demand.—When Necessary.*—Where there has been a default in the provisions of a conditional contract for the sale of personal property and the possession of the goods has thereby become wrongful, no demand for a return of the goods is necessary prior to the institution of an action in replevin. p. 484.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by Julius H. Buettner Furniture and Carpet Company against Etta Hillel. From a judgment for the plaintiff, the defendant appeals. *Affirmed.*

Marcus Hershcovitz, for appellant.

James W. Brissey, for appellee.

IBACH, J.—Appellee brought this action of replevin for certain household goods alleged to be in appellant's possession and unlawfully detained by her. To this complaint appellant filed her verified answer in general denial. A trial by the court resulted in a general finding and judgment for appellee. Appellant's motion for new trial was overruled, and this is assigned as error. This mo-

Hillel v. Julius H. Buettner Furn., etc., Co.—62 Ind. App. 481.

tion was based on a number of grounds. Those argued are: (1) "The judgment is clearly against the weight of the evidence. (2) The finding of the court is not sustained by the evidence. (3) Error of the court in admitting in evidence a certain written article of agreement supposed to have been entered into between the plaintiff and the husband of defendant, bearing date of April 15, 1911."

The first specification is not a statutory ground for a new trial, and therefore presents no question for review. §585, cl. 6, Burns 1914, §559 R. S. 1881. In the second specification the word

1. "finding" is used instead of the word "decision," but it has been held that the former word is equivalent to the word used in the
2. statute, when the cause has been tried by the court, so that the ground for a new trial in the form here appearing properly presents the question for a review of the evidence. *Bump v. Sellers* (1913), 54 Ind. App. 146, 102 N. E. 875, and cases cited. The assignment that the decision "is not sustained by the evidence" is in effect equivalent to the assignment that the decision "is not sustained by sufficient evidence."
3. lent to the assignment that the decision

The facts as they appeared from the evidence are that the appellee is a furniture dealer, and appellant's husband, N. Hillel, who has since died, obtained possession of the furniture in ques-

4. tion by virtue of a contract of conditional sale, by the terms of which he was to pay the sum of \$184.80 in weekly installments of \$2 each. Appellee was to retain title and the right to recover possession on default of the purchaser. The contract contains the further condition that in case of the violation by N. Hillel of other provisions of the contract, among which is that in case of sale or disposal, or an attempt to sell or dispose of the

property, or removal of the same by N. Hillel or any one else from the then place of residence of the mortgagor, then appellee might take the property into its possession. There is evidence also from which the trial court could very properly infer that appellant's husband executed the instrument relied on by appellee, and that she knew of that fact; and the evidence is uncontradicted that appellant retained possession of the same property on the death of her husband, in their home in St. Louis, Missouri. There is some evidence, contradicted it is true, which shows that at the time of the death of appellant's husband he was in default of his payments and that she never made any payments after his death. There is also some evidence tending to show that the goods purchased were found in appellant's possession in Indiana Harbor, Indiana, where appellant was residing when suit was brought. The contract of sale was properly received in evidence, and this court can not reverse the judgment of the trial court on the sufficiency of the evidence, since there is some evidence to support every material fact essential to appellee's recovery.

Under the facts of the case appellant can not insist that the terms of the contract can not be enforced against her, because she did not execute the original contract of sale. On the contrary, when the property was found in her possession, and default had occurred in the payments, her right to retain the property under such original contract was terminated, and since the contract of sale provided against the removal of the property from the domicile of the purchaser, when appellant removed the same into this state, without the consent

of the owner, her act amounted to a conversion of the property and her possession in this state from that time became wrongful and no demand was necessary before bringing the suit.

A demand is not necessary except where a party has possession of the property of another lawfully, and a demand will make the possession unlawful. *Cox v. Albert* (1881), 78 Ind. 241; *Deeter v. Sellers* (1885), 102 Ind. 458, 1 N. E. 854; *Haffner v. Barnard* (1890), 123 Ind. 429, 24 N. E. 152; *Hoover v. Lewin* (1914), 56 Ind. App. 367, 105 N. E. 400.

Judgment affirmed.

NOTE.—Reported in 113 N. E. 12. Conditional sales, recovery of goods, 133 Am. St. 564. See under (4) 35 Cyc 702; (5) 34 Cyc 1404.

GARRISON v. MILLER ET AL.

[No. 9,021. Filed March 31, 1916. Rehearing denied June 23, 1916.]

JUDGMENT. — *Opening Default. — Showing Meritorious Defense. — Statutes.*—Under §627 Burns 1914, §600 R. S. 1881, providing that a party against whom a judgment has been rendered without other notice than a newspaper publication, may have the same opened within five years and be allowed to defend, and under §628 Burns 1914, §601 R. S. 1881, providing that before any judgment shall be opened notice should be given the original complainant of the intention to make application therefor, and that a full answer should be filed to the original complaint, a party is not entitled to have a judgment opened where the records show that he has failed to file an answer as required by the statute.

From Marion Superior Court (92306); *Edward F. Quigley*, Judge *Pro tem*.

Action by Forest L. Garrison against Winifred Miller and another to have a judgment opened. From an adverse judgment, the plaintiff appeals. *Affirmed*.

William A. Reading, H. G. Hargrove and W. F. Elliott, for appellant.

Howe Stone Landers and Joseph W. Hutchinson, for appellees.

FELT, P. J.—This is a proceeding by appellant on a verified amended motion to open up a decree and

permit a defense to be made. Each of the appellees separately demurred to the motion on the ground that the facts averred were insufficient to entitle appellant to have the decree opened up as prayed. The court sustained each of the demurrers and appellant duly excepted and, refusing to plead further, judgment was rendered that he take nothing by his motion and that he pay costs. From this judgment an appeal was taken, and the several rulings of the court on the separate demurrers are assigned as error.

Omitting formal allegations, the substance of the amended motion is that appellant is informed that in 1910 he was made defendant to a certain suit brought by appellees in the Marion Superior Court; that notice was issued by publication; that he was at the time a nonresident of the State of Indiana, and continued to be until after the decree was rendered against him; that he had no actual notice or knowledge of the suit until long after the decree was rendered; that said decree foreclosed a lien against real estate owned by him for \$78.12, and thereafter appellees obtained a sheriff's deed for the property which is described; that since the foreclosure of said lien appellant has expended \$369.98 in the payment of taxes and assessments against said property; that the real estate is worth \$1,000; that as soon as he learned that appellees claimed title to said property, and within five years from the rendition of the decree foreclosing said lien, he filed this motion.

Sections 627 and 628 Burns 1914, §600, 601 R. S. 1881, are as follows: Section 627: "Parties against whom a judgment has been rendered without other notice than the publication in the newspaper herein required, except in cases of divorce, may, at any time within five years after the rendition of the

judgment, have the same opened, and be allowed to defend.

Section 628: Before any judgment shall be opened, such party shall give notice to the original complainant, or his heirs, devisees, executors, or administrators, of his intention to make application to have the judgment opened as the court, in term, or the judge thereof, in vacation, shall require; and shall file a full answer to the original complaint, and an affidavit stating that, during the pendency of the action, he received no actual notice thereof in time to appear in court and object to the judgment; and shall also pay all such costs of the action as the court shall direct."

The two sections are to be construed together, and when so considered they show that a person to come within the provisions must "file a full answer to the original complaint." As a matter of practice, the moving party should tender with his verified motion the answer he wishes to file, to the end that the court may be advised that he has a defense to the action, and for the further purpose of avoiding delay in disposing of the case if the judgment is opened up and the moving party permitted to defend the original action. In the case at bar no answer was either tendered or filed, and there is nothing in the record to show that appellant had or has any defense to the original suit. In the absence of such showing the court did not err in sustaining the demurrers. As supporting the principle involved see: *Meyer v. Wilson* (1906), 166 Ind. 651, 656, 76 N. E. 748; *Woods v. Brown* (1884), 93 Ind. 164, 168, 47 Am. Rep. 369; *Bryant v. Richardson* (1890), 126 Ind. 145, 148, 25 N. E. 807; *Williams v. Hitzie* (1882), 83 Ind. 303, 308; *Brandt v. Little* (1907), 47 Wash. 194, 91 Pac. 765; 14 L. R. A. (N. S.) 213, and notes. To obtain the relief prayed for, it was essential that appellant bring his case within

the statute. "Where there is no showing of a meritorious defense, a court of equity will not grant relief, even where the judgment is void on its face." *Schilling v. Quinn* (1912), 178 Ind. 443, 447, 99 N. E. 740; *Meyer v. Wilson*, *supra*, p. 658.

The statute is too plain to leave doubt as to the legislative intent. Some confusion has arisen by failure to distinguish cases like the one at bar, and those arising under §405 Burns 1914, §396 R. S. 1881, from direct proceedings to annul or set aside judgments that are absolutely void for fraud in their procurement, or for want of jurisdiction of the subject-matter, or for failure to obtain jurisdiction over the person of the defendant in any way recognized by law. In cases of the latter class there are decisions holding that it is not a question of excusable neglect or meritorious defense, but one of power and authority to render the judgment; that such judgments only have form, without substance or validity of any kind, and are therefore void; that to annul or set aside such a judgment it is not necessary to show a meritorious defense, for the party either has never been legally before the court or the court was without jurisdiction of the subject-matter, or of either the person or subject-matter. The question is not directly involved here, but in view of the discussion of the question decided, we deem it helpful to make the foregoing observations. See, also, *Dobbins v. McNamara* (1888), 113 Ind. 54, 57, 14 N. E. 887, 3 Am. St. 626; *Willman v Willman* (1877), 57 Ind. 500, 503; *Wiley v. Pratt* (1864), 23 Ind. 628, 636; *Cavanaugh v. Smith* (1882), 84 Ind. 380, 383; *Earle v. Earle* (1883), 91 Ind. 27, 35; *Stubbs v. McGillis* (1908), 44 Colo. 138, 96 Pa. 1005, 18 L. R. A. (N. S.) 405 and notes, 130 Ala. St. 116.

Judgment affirmed.

NOTE.—Reported in 112 N. E. 22. Opening and vacating judgments, 52 Am. St. 795; 23 Cyc. 962.

COQUILLARD v. COQUILLARD ET AL.

[No. 9,033. Filed June 27, 1916.]

1. **WILLS.—Construction.—Contingent Remainders.**—Where a testator's will devised lands owned in fee to the widow for life and then to two sons as tenants in common for life, the remainder in fee going to such of the son's children as might survive, the estate limited to the unborn children of either son of the testator was not a vested but a contingent remainder in fee, which would vest on the birth of a child to such son, subject to be opened up to let in other children of such son afterwards born alive. p. 497
2. **WILLS.—Construction.—Qualified or Determinable Fee.**—Where a will devised, from an estate in lands owned in fee, a life estate to testator's two sons in common, subject to the widow's life estate, the remainder in fee going to the children, if any be born, of the sons, such devise did not exhaust the testator's entire estate in the fee, the undisposed of remnant being a base, determinable or qualified fee, which, when it shall be determined that the contingency of the birth of a child to a son cannot occur, will ripen into a remainder in fee. p. 498.
3. **ESTATES.—Determinable or Qualified Fee.**—A determinable or qualified fee is an estate in fee for the reason that it may continue forever, and it is an estate of inheritance descendible to heirs and may be assigned or devised. p. 499.
4. **WILLS.—Construction.—Residuary Clause.**—Where a will failed to make a specific devise of a determinable fee in lands owned by the testator, it passed into the residue of the estate that was disposed of by the general residuary clause, which devised it to the widow and two sons as tenants in common in equal shares. p. 499.
5. **WILLS.—Construction.—Estates.**—Where a testator devised to each of two sons, A and B, a life estate in the undivided half of lands owned in fee, subject to the prior life estate of the widow, the remainder in fee going to the children, if any be born, of the sons, the widow and sons are, by reason of the remnant of the estate coming within the operation of the general residuary clause of the will, the owners, as tenants in common in equal shares, of a vested remainder in fee in the undivided one-half of the lands wherein A holds a life estate, limited on the successive life estates of the widow and A therein and by the contingency of the birth of a child to A. On a child being born to A the remainder in fee will determine and a remainder in fee limited on such life estates will vest in such child, subject to open up to let in after born children, and on the decease of A, no child having been born alive to him, said remainder in fee in the undivided one-half of said lands will then become absolute in the heirs of A, in the testator's widow and in B, or in their respective heirs, if deceased;

and the parties would have similar rights and interests in the other half of such lands, involving, however, the contingency of the birth of children to B. p. 499.

6. PARTITION.—*Right of Action.—Possession.*—Where a testator devised a life estate to each of two sons in the undivided half of certain lands, subject to the prior life estate of the widow, she cannot maintain an action in partition, since as sole owner of the life estate she is entitled to exclusive possession of the land. p. 502.
7. PARTITION.—*Right of Action.—Possession.*—Where a life estate in certain lands was created in the testator's widow, with subsequent life estates to two sons, neither of them can maintain an action in partition during the life of the mother, since, in the absence of a conveyance or surrender by the widow of any part of her life estate to the sons, they have no right of possession to the lands. p. 502.
8. PARTITION.—*Right of Action.—Possession.*—Where, by reason of intervening life estates, the right to present possession is not annexed to the base or determinable fee of which a testator's widow and two sons are tenants in common, neither, as tenants in such qualified fee, can enforce partition. p. 502.
9. PARTITION.—*Right of Action.—Possession.*—Even where partition is a matter of equitable cognizance only those in possession or entitled to possession may file a bill for partition in equity. p. 503.
10. JUDGMENT.—*Relief.—Conformity to Pleadings.*—Where an answer is filed, the court may grant any relief consistent with the case made by the complaint and embraced within the issues, as provided by §394 Burns 1914, §385 R. S. 1881, and an action in partition may be regarded as a proceeding to convert the lands into a fund and for the investment of the same where the facts in the case warrant such a conclusion. p. 503.
11. REMAINDERS.—*Sale of Property.—Equity Jurisdiction.—Administration of Estates.*—The trial court, in the exercise of its chancery powers, is clothed with jurisdiction to direct the sale and conversion of lands in fee held by a life tenant with conditional estates over to unascertained persons, where emergencies arise rendering action by the court imperative in order that the persons interested may be protected in their legal rights, and the body of the estate preserved for them, but such extraordinary powers should be used with caution. p. 508.
12. REMAINDERS.—*Sale.—Order of Court.—Persons Bound.*—In an action for partition, where it appears that all persons in being having an interest in the lands are parties to the suit, and where the exigencies of the situation require such action on the part of the court, the trial court may by proper decree order that the lands be sold free of all life estates and remainders and that title in fee simple shall pass to the purchaser, and such a decree is binding on the unborn grandchildren of a testator who devised to them,

subject to intervening life estates, the fee in the lands involved in the action. p. 509.

13. REMAINDERS.—*Sale.—Order of Court.—Proceeds.*—While the court, in the exercise of its chancery powers, has the right to direct the sale and conversion of lands in fee held by a life tenant with conditional estates over to unascertained persons, yet such power should not be exercised beyond the scope of the necessity of protecting the estate and the interests of the beneficiaries therein, and, where the exigencies of the case require the sale of the lands, the funds derived therefrom must be substituted for the lands, all interests and estates in the latter being transferred to the former, and the fund must be administered as nearly as possible as the lands would have been handled had there been no conversion; but where the court, in the exercise of its discretion, deems that the circumstances of the case require such action, it has the power to order the payment to the life tenants of the estimated value of their estates and allow the residue to accumulate at interest for the benefit of the contingent owners. p. 511.

14. PARTITION.—*Sale of Lands.—Order of Court.—Proceeds.—Distribution.*—In an action for partition, where it was disclosed that a testator had devised, from lands owned in fee, a life estate to two sons in common, subject to the widow's prior life estate therein, the remainder in fee going to the children, if any be born, of such sons; the fund arising from the sale of the land as decreed by the court, should, by reason of the special circumstances of the case, be distributed as follows: first, the costs and expenses of the proceeding should be paid out of the fund; second, the net income from the residue of the fund should be paid to the widow during her life, and upon her death, if both sons shall be alive, the net income from one-half the fund should be paid to each son during the remainder of his life, and on the decease of a son, a child or children having been born alive to him, the testator's widow having theretofore died, one-half the fund should be paid to such child or children or their heirs, but if a son shall die, subsequent to the death of the widow, without children having been born to him, and the brother survives, distribution of half of the fund should be to the heirs of the deceased son, to the heirs of the widow and to the surviving son; and on decease of the other son, under like circumstances, a similar distribution should be made of the other half of the fund, while the decease of a son during the lifetime of the widow would not change the course of the distribution, but would postpone it until her death. p. 513.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Alexis Coquillard and another against

Joseph A. Coquillard. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

Rich & Rich, for appellant.

Hubbard & Hubbard, for appellees.

CALDWELL, C. J.—This appeal is a companion case to that of *Coquillard v. Coquillard* (1916), ante 426, 113 N. E. 474, decided at this term. The latter involves items Nos. 3 and 17 of the will of Alexis Coquillard, Sr., and real estate thereby devised. This appeal involves items Nos. 2 and 17 of such will and real estate devised by such items. The questions properly presented on this appeal arise under exceptions reserved to conclusions of law stated on a special finding of facts.

The substance of the finding is as follows: Alexis Coquillard, Sr., died testate in St. Joseph county, seized in fee of certain described real estate in said county, of the probable value of \$43,375. His will was probated March 3, 1890. He left surviving him his widow, appellee Maude M. Coquillard, and his two sons, the appellee Alexis Coquillard, Jr., and appellant Joseph A. Coquillard. He left surviving him no other children or descendants. Maude M. Coquillard was born October 23, 1854; Alexis Coquillard, Jr., January 21, 1882; and appellant December 18, 1884. Both sons are unmarried and childless. The estate has been fully settled and the executor discharged, and all trusts created by the will have been fully executed. The real estate involved is suburban, subject to heavy taxes and assessments for urban improvements. It yields but little income, and is a source of expense much exceeding the income. Its main value consists in its fitness for subdivision and sale as urban real estate. It is not susceptible of division and cannot be partitioned among the respective

owners, and it should be sold and the proceeds divided. Item No. 2 of the will is as follows:

“I give to my said wife” (the lands involved, describing them) “to have and to hold the same unto my said wife during the period of her natural life, and at her death, I give said lands to my children, Alexis Coquillard, Jr., and Joseph A. Coquillard, and such other children as I may have born to me, to be held by them share and share alike, during their respective lives, and on the death of my several children, then I give the remainder of the share of each child in said land in fee simple to such children as my said children may leave surviving them.”

Item No. 17 is as follows:

“I give and bequeath all the residue of my estate both real and personal to my wife and children, my wife to have one-third and my children two-thirds thereof.”

The first and second conclusions of law are to the effect that appellee, Maude M. Coquillard, owns an estate in said lands for the period of her natural life, subject to which appellee Alexis and appellant Joseph A. own a life estate therein. The other conclusions of law are as follows: (3) That Alexis Coquillard, Jr., Maude M. Coquillard, and Joseph A. Coquillard each has a fee simple in the undivided one-third of all said real estate, subject first to the life estate of Maude M. Coquillard, and subject second to the life estate of Alexis Coquillard, Jr., and of Joseph A. Coquillard; that said fee is so vested in each of said parties until the happening of the following contingency, to wit: The death of Alexis Coquillard, Jr., with a child or children surviving him, or the death of Joseph A. Coquillard, with a child or children surviving him. (4) After the death of Maude M.

Coquillard, and upon the death of Alexis Coquillard, Jr., with a child or children surviving him, a remainder in fee in the undivided one-half of said real estate shall vest in such child or children; that after the death of Maude M. Coquillard, and upon the death of Joseph A. Coquillard, with a child or children surviving him, a remainder in fee in the undivided one-half of said real estate shall vest in such child or children. (5) That said lands should be sold free of all life estates and remainders, and title in fee simple passed to the purchaser, free from all claims of parties herein, their heirs and descendants. (6) That on the sale of any of said lands, the proceeds, after the payment of costs, fees and expenses, as adjudged hereafter by the court, shall be distributed as follows: To Maude M. Coquillard, the value of her life estate, as herein found, to be computed according to the mortality tables; to Alexis Coquillard, Jr., and Joseph A. Coquillard, each the value of his life estate as herein found, to be computed according to the mortality tables; the residue to be divided into three equal parts. Each of said sons, parties hereto, shall execute his bond payable to the State of Indiana, and conditioned that the obligor shall pay over and account to the duly appointed guardian of any child or children that should be born to and shall survive the obligor the share of such child or children under the second clause of testator's will, as herein found.

In order that we may ascertain whether the court's conclusions of law were correctly stated on the facts found, it becomes necessary to construe items Nos. 2 and 17 of the will involved, and especially respecting the nature and quantity of the various estates thereby created. There were but two children born to testator, each of whom survived

him and are yet living, namely, appellee Alexis and appellant Joseph A. Coquillard. The possibility of other children being born to him was removed by his death. It results that the clause in item No. 2 of the will, reading as follows, "and such other children as I may have born to me" may be eliminated in determining what quantity of estate was devised to the two sons by said second item. It is apparent that by such item there is created in the widow an estate in all the lands involved for the period of her natural life and that, subject to such life estate in the widow, there is created in each son an estate in the undivided one-half of such lands for the period of his natural life. As long as both sons are living they, as life tenants, are tenants in common in all such lands, subject to the mother's interest as prior life tenant. The literal equivalent of the remaining portion of such item in its relation to either son may be expressed as follows: "On the death of such son, then I give the remainder of his share in such lands in fee simple to such children as he may leave surviving him." The estate created in each son being but a life estate, as we have indicated, strictly speaking there could be no remainder of his share after his death. It is evident, however, from the language used, that the testator thereby intended to limit on such life estate a remainder over in fee simple to the children of such son. No child has been born to either of testator's sons. We have then a situation wherein a remainder in fee is limited to a person or persons not ascertained, because not in being. The case is thus brought within the fourth class of contingent remainders, as defined by Fearn, thus: "When a remainder is limited to a person not ascertained or not in being at the time when such limitation is made."

Fearne, Cont. Rem. 9; 24 Am. and Eng. Ency. Law 397. In Butler's notes to Fearne on Contingent Remainders, §187, the author gives as an example of a contingent remainder of such class, the case where a remainder is limited to the first son of B, who has no son then born. The item of the will here then creates in the child or children of each of the sons of the testator a contingent remainder in fee in the undivided one-half of the lands involved. Such remainder has not as yet vested, for the sufficient reason that no such child has been born. We are required to determine the contingency on which such remainders will vest; whether, in the case of either son, the birth of a child or children to him within his lifetime is sufficient to that end, as to the undivided one-half of the lands involved, or whether such remainder will so vest only on the decease of said son leaving a child or children surviving him.

The third item of the will of Luke Walters, involved in *Alsman v. Walters* (1914), 184 Ind. 565, 106 N. E. 879, 111 N. E. 921, is in legal effect practically identical with the language used here, in creating estates in testator's sons and their children. The language used there is as follows: "I give and bequeath to my son, Francis M. Walters, during his natural life and after his death to his children surviving him in fee simple," certain described lands. In that case, two children had been born to Francis M. Walters, both of whom were living at the death of the testator. Appellee in that case was one of such children. The other child died in the lifetime of the life tenant, leaving the appellant, her son, surviving her. Under such circumstances the Supreme Court, after a comprehensive review and analysis of the decided cases, announced its decision, the holding being

indicated by the following, quoted from the opinion: "We are of the opinion that on the death of Luke Walters, the fee simple title to the land in question vested absolutely in appellee, and appellant's mother, subject to diminution to let in after born children, and consequently the court erred in concluding that appellee is the sole owner of the land." The decision there is to the effect that on the decease of the testator, the remainder in fee simple, subject to the life estate created in Francis M. Walters, vested in the children of the latter then in being; that other children having been born to the life tenant, Francis M. Walters, the estate theretofore vested in fee as aforesaid, opened up to receive such other children at birth as owners in fee on an equality with the children living at the death of the testator; that one of such children having died intestate, prior to the termination of the life estate, his interest descended to his heirs. See, also, *Amos v. Amos* (1889), 117 Ind. 19, 24, 19 N. E. 539, and *McIlhinny v. McIlhinny* (1894), 137 Ind. 411, 37 N. E. 147, 24 L. R. A. 489, 45 Am. St. 186. At page 418 of the case last cited, the following language is used: "Accordingly, it has been held by this court, and so ruled at common law, that a valid remainder might be limited on a particular estate for life, to unborn children, and, on their birth during the life tenancy, the remainder would immediately vest. The remainder is contingent before, and vested after, the birth of the remainderman." It results, under authority of *Alsman v. Walters, supra*, and

1. we so hold, that while in the case at bar the estate limited to the unborn children of either son of the testator by item No. 2 of said will is and remains a contingent remainder in fee, such

estate will vest as a remainder in fee on the birth of a child to such son, subject to be opened up to let in other children of such son afterwards born alive.

It thus appears that, by virtue of item No. 2 of the will, there are carved from the estate in fee owned by testator at the time of his decease, 2. in the lands involved, estates in number and quantity as follows: (1) A life estate in the widow as indicated; (2) a life estate in each son, subject to the life estate in the widow also as indicated; (3) a contingent remainder in fee in the unborn child or children of each son. It is apparent also, that the entire quantity of estate owned by testator in such lands is not exhausted by the estates carved therefrom by such item No. 2. There is left a remnant limited on the successive life estates, and limited by such contingent remainders in fee created in a child or children of the respective sons. That is, directing our attention to an undivided one-half of such lands, in order that we may make ourselves clear, such undivided half is devised to the widow for life, remainder over for life to either son as the case may be, and a contingent remainder in fee to the unborn child or children of such son. The remnant in such half is a vested estate therein limited on the successive life estates and limited by such contingent remainder in fee. The contingent event is of a nature such as that it may or may not occur. The course of time, however, will disclose that it has occurred or that it can not occur. A child or children may be born to such son, or his decease will render such event impossible. The happening of the contingency will terminate the estate which we have designated as a remnant. The disclosure that such contingent event can not occur will ripen such

remnant into a remainder in fee. The same line of reasoning leading to a like conclusion applies, of course, to the other half of the estate under consideration. It thus appears that the estate which is undisposed of by item No. 2 of the will is one class of what is denominated a base, determinable or qualified fee. 16 Cyc 602; 10 R. C. L. 652; *First Universalist Society v. Boland* (1892), 15 L. R. A. 231, note; Tiedeman, Real Prop. §§36, 211.

Such an estate is an estate in fee for the reason

3. that it may continue forever. It is an estate of inheritance descendible to heirs and may be assigned or devised. *Id.*; and *Aldred v. Sylvester* (1916), 184 Ind. 542, 111 N. E. 914; *Mendenhall v. First New Church, etc.* (1911), 177 Ind. 336, 98 N. E. 57. Such determinable fee not being devised

by item No. 2 of the will, passed into the
4. residue of the estate, and by item No. 17, which is a residuary clause, was devised to the widow and the two sons as tenants in common in equal shares. Page, Wills §507; *Barker v. Town of Petersburg* (1907), 41 Ind. App. 447, 82 N. E. 996. It follows that the first conclusion of law is correctly stated. The second should be more definite, to the effect that Alexis Coquillard is the owner of an estate in the undivided half of said lands for and during the period of his natural life, limited, however, on the preceding life estate in Maude M. Coquillard; and that Joseph Coquillard is the owner of a like estate in the other undivided one-half of such lands. The third and fourth conclusions should be restated,

5. to the effect that in one undivided half of such lands Maude M. Coquillard, Alexis Coquillard and Joseph Coquillard are the owners as tenants in common in equal shares of a vested remainder in fee, limited on the successive life

and the parties would have similar rights and interests in the other half of such lands, involving, however, the contingency of the birth of children to B. p. 499.

6. PARTITION.—*Right of Action.—Possession.*—Where a testator devised a life estate to each of two sons in the undivided half of certain lands, subject to the prior life estate of the widow, she cannot maintain an action in partition, since as sole owner of the life estate she is entitled to exclusive possession of the land. p. 502.
7. PARTITION.—*Right of Action.—Possession.*—Where a life estate in certain lands was created in the testator's widow, with subsequent life estates to two sons, neither of them can maintain an action in partition during the life of the mother, since, in the absence of a conveyance or surrender by the widow of any part of her life estate to the sons, they have no right of possession to the lands. p. 502.
8. PARTITION.—*Right of Action.—Possession.*—Where, by reason of intervening life estates, the right to present possession is not annexed to the base or determinable fee of which a testator's widow and two sons are tenants in common, neither, as tenants in such qualified fee, can enforce partition. p. 502.
9. PARTITION.—*Right of Action.—Possession.*—Even where partition is a matter of equitable cognizance only those in possession or entitled to possession may file a bill for partition in equity. p. 503.
10. JUDGMENT.—*Relief.—Conformity to Pleadings.*—Where an answer is filed, the court may grant any relief consistent with the case made by the complaint and embraced within the issues, as provided by §394 Burns 1914, §385 R. S. 1881, and an action in partition may be regarded as a proceeding to convert the lands into a fund and for the investment of the same where the facts in the case warrant such a conclusion. p. 503.
11. REMAINDERS.—*Sale of Property.—Equity Jurisdiction.—Administration of Estates.*—The trial court, in the exercise of its chancery powers, is clothed with jurisdiction to direct the sale and conversion of lands in fee held by a life tenant with conditional estates over to unascertained persons, where emergencies arise rendering action by the court imperative in order that the persons interested may be protected in their legal rights, and the body of the estate preserved for them, but such extraordinary powers should be used with caution. p. 508.
12. REMAINDERS.—*Sale.—Order of Court.—Persons Bound.*—In an action for partition, where it appears that all persons in being having an interest in the lands are parties to the suit, and where the exigencies of the situation require such action on the part of the court, the trial court may by proper decree order that the lands be sold free of all life estates and remainders and that title in fee simple shall pass to the purchaser, and such a decree is binding on the unborn grandchildren of a testator who devised to them,

Coquillard v. Coquillard—62 Ind. App. 489.

subject to intervening life estates, the fee in the lands involved in the action. p. 509.

13. REMAINDERS.—*Sale.—Order of Court.—Proceeds.*—While the court, in the exercise of its chancery powers, has the right to direct the sale and conversion of lands in fee held by a life tenant with conditional estates over to unascertained persons, yet such power should not be exercised beyond the scope of the necessity of protecting the estate and the interests of the beneficiaries therein, and, where the exigencies of the case require the sale of the lands, the funds derived therefrom must be substituted for the lands, all interests and estates in the latter being transferred to the former, and the fund must be administered as nearly as possible as the lands would have been handled had there been no conversion; but where the court, in the exercise of its discretion, deems that the circumstances of the case require such action, it has the power to order the payment to the life tenants of the estimated value of their estates and allow the residue to accumulate at interest for the benefit of the contingent owners. p. 511.
14. PARTITION.—*Sale of Lands.—Order of Court.—Proceeds.—Distribution.*—In an action for partition, where it was disclosed that a testator had devised, from lands owned in fee, a life estate to two sons in common, subject to the widow's prior life estate therein, the remainder in fee going to the children, if any be born, of such sons; the fund arising from the sale of the land as decreed by the court, should, by reason of the special circumstances of the case, be distributed as follows: first, the costs and expenses of the proceeding should be paid out of the fund; second, the net income from the residue of the fund should be paid to the widow during her life, and upon her death, if both sons shall be alive, the net income from one-half the fund should be paid to each son during the remainder of his life, and on the decease of a son, a child or children having been born alive to him, the testator's widow having theretofore died, one-half the fund should be paid to such child or children or their heirs, but if a son shall die, subsequent to the death of the widow, without children having been born to him, and the brother survives, distribution of half of the fund should be to the heirs of the deceased son, to the heirs of the widow and to the surviving son; and on decease of the other son, under like circumstances, a similar distribution should be made of the other half of the fund, while the decease of a son during the lifetime of the widow would not change the course of the distribution, but would postpone it until her death. p. 513.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Alexis Coquillard and another against

acquires the fee to an undivided portion of such lands, such life tenant, although entitled to the possession of the whole of such lands, or the owner or owners of the unconveyed portion of such remainder in fee, although not entitled to the possession of any part of such lands, may maintain partition; or, where one of such remaindermen acquires such life estate or an undivided interest therein, either he or such other remaindermen, although the latter is not entitled to possession, may maintain partition. *Smith v. Andrew* (1912), 50 Ind. App. 602, 98 N. E. 734. To the extent indicated, such statute modifies or extends the common-law rule, but it is not applicable to the facts of this case.

It follows from what has been said that Maude

6. M. Coquillard, as life tenant, can not maintain partition as she holds her life estate as sole owner rather than as a cotenant. 30 Cyc 178.

7. As she has not surrendered or conveyed her life estate, or any part thereof, to the subsequent life tenants, Alexis, as one of the latter, is not entitled to partition as no possessory right is annexed to his estate. *Eberle v. Gaier* (1913), 89 Ohio 118, 105 N. E. 282; *Bice v. Nixon* (1890), 34 W. Va. 107, 11 S. E. 1004; *Brillhart v. Mish* (1904), 99 Md. 447, 58 Atl. 28. For reasons already indicated, neither Maude M. Coquil-

8. lard nor Alexis Coquillard, as a tenant in such qualified fee, can enforce partition.

It follows that if this action should be considered merely as a proceeding for the partition of lands it can not be maintained. *Fry v. Hare* (1905), 166 Ind. 415, 77 N. E. 803; *Tower v. Tower* (1895), 141 Ind. 223, 40 N. E. 747; *Hawkins v. McDougal* (1890), 125 Ind. 597, 25 N. E. 807; *Shaw v. Beers* (1882), 84 Ind. 528; *Freeman, Coten. and Part.* (2d ed.) §§440, 446; *Weston v. Stoddard* (1893), 20 L.

R. A. 624, note; note to *Brown v. Brown* (1910), 28 L. R. A. (N. S.) 125. The rule is the same where partition is a matter of equitable cognizance,

9. as only those in possession or entitled to possession may file the bill in such jurisdiction. Pomeroy, Eq. Jurisp. (2d ed.) §1387, note 1; Freeman, Coten. and Part. §440; 2 White and Tudor, Leading Cases in Eq., note to *Agar v. Fairfax*, 894.

We are not required, however, to regard this action as a proceeding for partition. As indicated, certain very essential elements of that sort of action are lacking. The characterizing facts here are nonessentials in a proceeding for partition. Partition resulting in the division of the lands, if the court were authorized to award it, would be ineffectual as a remedy. The embarrassments of the situation would still exist. If partition were effectual, it would be because the lands were ordered sold as indivisible. The parties in interest here may be awarded those considerations to which they seem to be entitled and all their rights protected only by a sale of the lands and a reinvestment of the proceeds. The characterizing facts appeal to the court to that end, rather than that the lands be partitioned. Where an answer is filed, the

court may grant any relief consistent with
10. the case made by the complaint and embraced within the issue. §394 Burns 1914, §385 R. S. 1881; *Humphrey v. Thorn* (1878), 63 Ind. 296. Considering then, the facts that individualize the action, we regard this as a proceeding to convert the lands into a fund and for the investment of the fund. The nature of the action being so regarded, three questions are presented for our consideration: First, in such a general situation as is presented here, whether the trial court in the exercise of its chancery jurisdiction is

clothed with power to direct the sale of the lands; second, whether, under the specific facts, such power, if it exists, was properly exercised; and third, whether the court's decree, if otherwise properly entered, is binding on the contingent owners who may hereafter be born.

We proceed to consider these questions. The situation is as follows: The testator evidently contemplated that this real estate should be a source of income to the widow during her life, and thereafter to the sons during their respective lives, and that the corpus of the estate should be preserved to the unborn children of the latter. Although he did not specifically so direct, it was probably his intent that the land should be preserved as land until it eventually vested by absolute title under the will. Under the facts, and by reason of changed conditions which the testator probably did not foresee, his purpose is being frustrated, and is likely to be completely defeated unless the arm of a court exercising chancery powers may be interposed to the end that the lands may be sold and the various estates and interests therein transferred to the fund. Such changed conditions and the specific facts are to the following effect: At the decease of the testator, the real estate involved was situate near the city of South Bend. It was then regarded as farm land, and was liable to charges only as such. The city, however, has rapidly increased in territorial extent, population and industrial importance. The lands now are urban or suburban to such city. Although yielding but small income, they have become subject to heavy charges for taxes, public improvement assessments and the like. As a consequence, the expense of maintaining the land greatly exceeds the income. As contemplated by the testator, these lands

should be a source of income to the widow, and later, in the natural course of events, to the sons. The expenses, however, swallow up the income. Sums in addition must be paid to preserve the body of the estate. Unless the court may intervene, the lands cannot be conveyed by good title until after the decease of the sons. Their life expectancies at the commencement of this action in 1914, as estimated by standard tables of mortality, were approximately thirty-three and thirty-four years respectively. If the owners of limited estates in the lands were disposed to continue to discharge all liens and expenses until the lands may be conveyed, it would seem to be unreasonable to require or expect them to do so. The estimated value of the land as found by the court, if invested at the legal rate, would yield an income of more than double the value of the lands within the period of such expectancies. Under the circumstances, it would seem that the best interests of all concerned require that the lands be transformed into a fund. The interests of the widow and sons so require in order that they may receive the income in succession as intended by the testator. The interests of the unborn contingent owners so require in order that the body of the estate, although converted into personality, may be preserved for them.

It cannot be doubted that the power is lodged in chancery in a proper case, where all persons interested and likely to be affected by the decree are before the court, to convert realty into personality, and to direct and supervise reinvestment. Thus, *Ridley v. Halliday* (1900), 106 Tenn. 607, 61 S. W. 1025, 53 L. R. A. 477, 82 Am. St. 902, involved lands held under a grant for the use of a life tenant with remainder over to successive classes, some of whom were not in being. It was

made to appear there that the interests of all concerned plainly required the sale of the lands and the reinvestment of the proceeds. In approving a decree to that end, the court of Chancery Appeals of Tennessee held that, under the circumstances presented, a court of chancery has inherent power to order a sale, the interested persons *in esse* being before the court, and that a decree so entered is binding on contingent owners not in being. The facts there were very similar to those here, differing principally in that the lands there had been conveyed and were held in trust for the life tenant and remaindermen.

In *Curtiss v. Brown* (1862), 29 Ill. 201, 230, likewise the lands involved were held in trust for the use of a life tenant with contingent interests over to unascertained persons, and, in a situation similar in effect to those presented here, the court, in holding that chancery is clothed with power to grant relief by a sale, uses this language: "Can it be said that the beneficiary of an estate which would bring in the market one hundred thousand dollars, should perish in the street from want, or be sent to the poor-house for support, or that the estate should be totally lost, because there is no power in the courts to relieve against the provisions of the instrument creating this trust? Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency."

A like conclusion was reached in *Hale v. Hale*

(1893), 146 Ill. 227, 33 N.E. 858, 20 L.R.A. 247, wherein the court affirmed a decree directing the sale of lands thereby affecting the titles of certain infants and the contingent interests of unborn persons. It was made to appear there that the lands were unproductive and subject to heavy charges by reason of their proximity to Chicago, but that they might be sold for a substantial sum, which upon being invested or loaned, would yield to the persons interested a considerable income. The decision is justified on the ground that where it is for the benefit of infants, courts of equity have the power, by virtue of their general jurisdiction over the estates of minors and others under disabilities, to authorize a conversion of real estate into personalty and of personalty into realty.

Each of the cases above cited and discussed involved an estate held in trust for the use of life tenants and contingent remaindermen, including persons not in being. While the fact that an express trust is involved may clothe a court of chancery with jurisdiction to direct its administration in order that its subject-matter may be preserved and its beneficiaries protected in their rights, yet some other equitable consideration must exist in order that the court may properly exercise its power, by directing the conversion of trust property into some other form where such conversion is not specifically authorized by the instrument of trust. In each of such cases, such other consideration consisted in that it was made to appear that the trust property was likely to be lost or that it was subject to great depreciation unless such conversion was directed, and consummated. A like consideration exists here, and we do not believe that the mere fact that no express trust is involved stands as a bulwark against action

by the court. To this effect is *Gavin v. Curtin* (1898), 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776, where no express trust was involved. The lands there were held under a devise to testator's daughter for life, with contingent interests over to others, including persons not in being. A decree directing the sale, on a showing that the lands were comparatively unproductive and that the charges and expenses very much exceeded the income, was approved; the court saying in substance that independent of the existence of a trust, a court of equity has jurisdiction to intervene where it is made to appear that otherwise a substantial right would be lost, and that in the presence of some exigency which makes the action of the court practically indispensable, it properly exercises its power. To the same effect is *Baldrige v. Coffey* (1900), 184 Ill. 73, 56 N. E. 411, following and approving *Gavin v. Curtin*, *supra*. See, also, *Ruggles v. Tyson* (1899), 104 Wis. 500, 79 N. W. 766, 81 N. W. 367, 48 L. R. A. 809; *Clyburn v. Reynolds* (1888), 31 S. C. 91, 9 S. E. 973; *Springs v. Scott* (1903), 132 N. C. 548, 44 S. E. 116; *Mayall v. Mayall* (1896), 63 Minn. 511, 516, 65 N. W. 942; *Bennett v. Nashville Trust Co.* (1912), 127 Tenn. 126, 153 S. W. 840, 46 L. R. A. (N. S.) 43, Ann. Cas. 1914A 1045.

Respecting the first two questions suggested as presented for consideration, we conclude that the trial court in the exercise of its chancery

11. powers is clothed with jurisdiction to direct the sale and conversion of lands in fee held by a life tenant with conditional estates over to unascertained persons, where emergencies arise rendering action by the court imperative in order that the persons interested may be protected in their legal rights, and the body of the estate pre-

served for them, and that while such extraordinary powers should be used with caution, in the case at bar, the court properly exercised such powers to the end indicated.

Directing our attention more particularly to the third question above suggested, all persons interested in the subject-matter of this proceeding and who are in being, are before the court. The life tenants and owners of such qualified fee, which as we have said is an estate of inheritance, are parties. The owners of the contingent interests can not be made parties as they are not in being. If in being, they would be necessary parties. The persons before the court are interested in urging upon the attention of the court every consideration that such unborn persons would be interested in presenting if in being and parties to the proceeding. Under such circumstances, and where the exigencies of the situation require action on the part of courts, impelled by practical necessity, they assume jurisdiction. Decrees entered under such circumstances are binding on persons not in being. We conclude that a proper decree entered in this proceeding

12. is binding on the unborn children of testator's sons, and that the fifth conclusion of law is correct. In addition to authorities above cited, see the following: *Bofil v. Fisher* (1850), 3 Rich. Eq. 1, 55 Am. Dec. 627; *Downey v. Seib* (1906), 8 L. R. A. (N. S.), 49, note; *Powell v. Wright* (1844), 7 Beav. 444; *Kent v. Church of St. Michael* (1892), 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 631, 32 Am. St. 693; *Dunham v. Doremus* (1897), 55 N. J. Eq. 511, 37 Atl. 62; *Story*, Eq. Pleading §§145, 146; *Freeman, Coten. and Part.* (2d ed.) §482; *Mead v. Mitchell* (1858), 17 N. Y. 210, 72 Am. Dec. 455; *Rutledge v. Fishburne* (1903), 97 Am. St., note p. 766; *Cheesman v. Thorne* (1833),

1 Edw. Ch. (N. Y.) 629; *Fox v. Fee* (1897), 24 App. Div. 314, 49 N. Y. Supp. 292; *Carter v. White* (1904), 101 Am. St. 870, note; *Coquillard v. Coquillard*, *supra*.

We can not, however, approve the sixth conclusion. It contemplates the depletion of the fund by paying to the parties to this proceeding the estimated value of their respective life interests. On the investment of the fund, Maude M. Coquillard would be entitled to the net income therefrom during life. Thereafter, each son would be entitled to the net income from one-half of the fund during the remaining period of his life. The court probably concluded that the payment to each life tenant of the estimated value of his interest in the fund would accomplish the legal equivalent of payment to him of income as indicated, and therefore that the payment of such legal equivalent is justified. If this were true, it will be observed that there is no provision for the restitution of the fund by the accumulation of interest on the residue. In addition, the conclusion is to the effect that such residue should be divided into three equal parts, but there is no specification as to the disposition of the parts. Presumably the court contemplated the payment thereof to the parties to this proceeding as owners of such qualified fee. The stipulation for the protection of the contingent remaindermen is indefinite. The decree entered on the conclusions contains no provision for their protection. On the subject of the distribution of the fund, it is simply to the effect that the costs and expenses be paid, and that the residue of the fund be distributed to the parties to the proceedings in proportion to their several interests.

A proceeding such as this is maintainable only on the theory that by reason of some exigency

growing out of changed conditions, it becomes necessary to convert lands into personalty in order

13. that the body of the estate may be preserved.

The courts are in accord, that in order to the validity of the proceedings the funds must be substituted for the lands, all interests and estates in the latter transferred to the former, and that the fund must be ordered administered as nearly as possible as the lands would have been handled had there been no conversion. *Noble v. Cromwell* (1858), 26 Barb. (N. Y.) 475; *Gavin v. Curtin*, *supra*; *Mead v. Mitchell*, *supra*; *Cheesman v. Thorne*, *supra*; *Bofil v. Fisher*, *supra*; *Monarque v. Monarque* (1880), 80 N. Y. 320, 326; *Barnes v. Luther* (1894), 77 Hun. 234, 28 N. Y. Supp. 400; *Rutledge v. Fishburne*, *supra*, note p. 767.

As we have indicated, it was apparently testator's intention that the lands involved here should be held, owned and enjoyed as lands under the various estates created therein until title became absolute under the terms of the will. While, as we have said, the courts by virtue of the compelling force of some necessity have the power to encroach upon the intention of the testator, in order that the estate may be preserved and the interests of the beneficiaries protected, such power should not be exercised beyond the scope of influence of such necessity. The separation of the life estates from the estates in remainder by estimating the values of the former and paying such values to the life tenants is not required here by the exigencies of the situation. To do so would constitute an unnecessary and, therefore, unauthorized infringement upon the testator's intention. The payment to the life tenants of the estimated values of their life estates and allowing the residue to accumulate at interest for the benefit of the contingent owners,

would doubtless accomplish the legal equivalent of holding the entire fund in trust as herein-after indicated. It is not likely, however, that by the former method the practical equivalent of the latter would be attained. It is within the power of the court, in its discretion, to dispose of the fund in the former method. 16 Cyc 616, 639; 30 Cyc 291; *Swain v. Hardin* (1878), 64 Ind. 85; *Russell v. Russell* (1874), 48 Ind. 456; *Datesman's Appeal* (1889), 127 Pa. 348, 17 Atl. 1086, 1100. Under the special circumstances of this case, however, we do not believe that such discretion should be exercised.

In *Ruggles v. Tyson*, *supra*, under facts similar to those involved here, it is expressly held, after a full examination of the decided cases, that the court, in the absence of some overpowering necessity, held not to exist there and not shown to exist here, has no power to direct the separation of the life estate from the estate in remainder by estimating the value of the former and paying such value to the life tenant. As is said there, such a course would substitute an expectancy for a certainty. The remaindermen here, on the termination of the life estates, the contingency having happened, are entitled under the will to the undiminished body of the estate. Likewise, the lands being transformed into money, they are entitled to the undiminished body of the fund. The exigency of the situation loses its force on the conversion of the real estate into personalty. To meet such exigency fully, a separation of the life estates from the estates in remainder is not required. As to whether the remaindermen would receive the equivalent of the body of the fund, by the separation of the life estates as indicated and by allowing interest to accumulate on the residue, is speculative.

The problem of handling the fund and its final distribution, while complex, is rendered comparatively simple by keeping in mind the various

14. estates and interests created in the lands by the will. In a general way, the course should be as follows: The costs and expenses of the proceeding should be paid out of the funds, since such costs and expenses are incurred for the benefit of all persons interested therein. A trust thereupon of necessity arises involving the residue of the fund. Such trust should be administered and executed under the guidance and supervision of the court, and in so doing the testator's intent should be carried out as nearly as possible. To that end, the net income should be paid to the widow during her life. If at the decease of the widow, the sons are living, the net income from one-half of the fund should be paid to each son during the remaining portion of his life. There can be a final distribution of one-half the fund on the decease of a son, the widow having theretofore died, and of the other half under like circumstances. On the decease of a son, a child or children having been born alive to him, the widow having theretofore died, distribution of one-half the fund should be to such child or children or their heirs or legatees. On the decease of the other son, under like circumstances, there should be a distribution of the remaining one-half of the fund. On the decease of a son, no child having been born to him, the widow having theretofore died, and the brother surviving, distribution of half of the fund should be to the heirs or legatees of the deceased son, to the heirs or legatees of the widow, and to the surviving son. On the decease of the other son, under like circumstances, distribution should be as aforesaid of the other half of

the fund, except of course, to his heirs or legatees instead of to him. The decease of a son within the lifetime of the widow would not change the course of distribution from as above indicated; it would simply postpone it until the decease of the widow. These general observations are made for the guidance of the court in entering its decree.

The judgment is reversed, with instructions to the court to restate its conclusions of law in harmony with this opinion and to decree accordingly.

NOTE.—Reported in 113 N. E. 481. Rights and remedies of remaindermen, 14 Am. St. 629. See under (1) 40 Cyc 1664, 1674, 1677; (2) 40 Cyc 1584–1589; (4) 40 Cyc 1949, 1950; (5) 40 Cyc 1591, 1593; (6), (7), (8), (9) 30 Cyc 178, 182, 190, 199; (11), (12) 16 Cyc 653, 654.

**THE FRANKFORT CONSTRUCTION COMPANY v.
MENEELY.**

[No. 8,996. Filed April 20, 1916. Rehearing denied June 27, 1916.]

1. **PARTNERSHIP.—Termination.—Grounds.—Fraudulent Bookkeeping.**—Partners are held to the highest degree of good faith toward each other, and where there is fraud on the part of one of the partners in keeping the partnership books, which were by the terms of the contract the basis of the division of profits between the parties, such breach of good faith is ground for a termination of the relationship and for an accounting, even though the duty of keeping the accounts was not specifically imposed on such partner by the contract of partnership. p. 516.
2. **PARTNERSHIP.—Termination.—Grounds for.—Refusal of Accounting.**—The refusal of a partner to make an accounting when demanded is ground for the termination of the partnership relation. p. 516.
3. **PARTNERSHIP.—Contract.—Refusal to Perform.**—In a suit for accounting between partners the trial court found that there had been formed between the plaintiff and defendant a partnership for the construction of roads under a contract providing that the plaintiff was to superintend the work of construction or be charged with the expense of procuring another to perform such services; that the defendant was obligated to provide all expense money; that the contract should be void if the plaintiff should

Frankfort Construction Co. v. Meneely—82 Ind. App. 514.

refuse to perform his part of the agreement; and that, while the plaintiff was engaged on several of the roads under construction, one road was built without his superintendence, for which road he was allowed no profit. *Held*, that such conclusions do not amount to a finding that the plaintiff refused to perform his part of the contract so as to make it void. p. 518.

4. PARTNERSHIP.—*Termination.—Grounds.—Conversion of Funds.*—A conversion of the funds of a partnership to his own use by one of the partners is ground for dissolution and an accounting, in spite of contractual provisions to the contrary. p. 518.
5. PARTNERSHIP.—*Rights of Partners.—Possession of Funds.—Division of Profits.*—Even though a contract of partnership provided that the profits should not be divided until the work of the partnership was completed, yet the profits accruing before that time were equally the property of both partners, and the appropriation of such funds by one partner, under a claim of ownership, to the exclusion of the other was sufficient justification for the latter refusing to continue the work, and the provision in the contract determining his rights therein in case of his refusal to continue its performance would have no application. p. 518.

From Tipton Circuit Court; *James M. Purvis*, Judge.

Action by William C. Meneely against the Frankfort Construction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Joseph P. Gray, O. E. Brumbaugh and Jesse R. Coleman, for appellant.

James V. Kent, Thomas M. Ryan and Gifford & Gifford, for appellee.

IBACH, C. J.—Appellee and appellant were partners in a joint undertaking for the construction of certain gravel roads in Clinton county, Indiana, and this action was brought by appellee on a complaint in two paragraphs, the first asking for an accounting from appellant; the second seeking to recover certain profits from the said undertaking, which it was alleged appellant had converted.

Appellant first urges error in the overruling of its demurrers to each paragraph of complaint. We

think the complaint is sufficient to withstand the objection urged, for it alleges an excuse for the failure of appellee to entirely complete on his part the contract between him and appellant, since there is averred fraud of appellant in keeping the books of the joint enterprise. Partners or

1. .persons engaged in joint adventures are held to the highest degree of good faith towards each other, and it is their duty to keep correct accounts. Lindley, Partnership (8th ed.) 466, 656; Elliott, Contracts §4905. Such breach of good faith is ground for termination of the relation, and for an accounting as to the dealings formerly had. Although the contract did not in terms impose on appellant the duty of keeping the partnership books, this did not make it less liable for the exercise of the highest good faith in keeping the accounts, and this duty is made greater by the fact that appellant's books were made by the contract the basis of the division of profits between the parties. Elliott, Contracts §4953; 30 Cyc 447. The complaint also averred that appellee demanded an accounting, which was refused, and such refusal
2. is in itself ground for the termination of a partnership relation.

Error is also assigned in the court's conclusions of law on the facts found. In brief, these facts are that appellant and appellee were associated in the construction of certain gravel roads in 1909 and 1910, the agreement between them being a verbal one; that this verbal agreement was superseded by a written agreement in 1911, and settlement was made for the roads previously constructed; that this latter agreement provided for the construction by the parties of four roads for which appellant had contracts, and one for which appellee had the contract, four of which roads, including the latter,

were known collectively as the Fickle roads and the other as the Barnett road; that appellee was to superintend or pay for superintending all the work and appellant was to furnish all money for expenses, each to share equally in profits; that appellant was to advance to appellee \$2.50 per day for the time actually employed on the roads, this, as well as any other expenses paid out for superintending the work, to be deducted from appellee's portion of the profits; that the contract should be null and void, except as to appellee's right to a per diem, if he should *refuse* to perform his part of the agreement; that, if a road should be graded or graveled and he should be absent from the road or fail to superintend it in the proper manner, appellant was to employ a competent foreman or superintendent to superintend said road and charge the expenses to appellee. It was also found that appellee, according to the terms of his contract, superintended all the work done in the construction of three of the roads, and while he was so engaged, another of the Fickle roads was built and constructed under a superintendent other than appellee; that appellee complied with all the terms of the contract on his part as to the Fickle roads; that the Barnett road was included in the written contract, but appellee had no part in its construction, and is not entitled to any of the profits therefrom; that the profits on said Fickle roads were \$2,419.07, of which sum appellee owned one-half; that there had been advanced to him \$423.05, which should be deducted from his share of profits; that there was due him as his share of profits \$786.48; that appellant refused on demand to pay his share of profits to appellee, and that it had appropriated to its own use the profits from said roads and claimed to be the owner of the same; that appellee converted and

appropriated to its own use, unlawfully and without right and to the appellant's damage, his one-half share of the profits to the value of \$786.48. Upon these facts the court stated as conclusions that the law is with the appellee, and that he is entitled to a judgment against appellant in the sum of \$786.48.

Appellant's principal objection to the conclusions of law is that the facts found show that the contract provided that it should be null and void if appellee refused to perform any part of his contract and also show that he did not take part in the construction of one of the roads mentioned in the contract, from which it is argued that he is not entitled to the profits awarded him by the court. To this it may

be said that there is no finding that appellee

3. refused to perform his part of the contract in any respect. The contract provided for the employment of a superintendent by appellant for any road which appellee should fail to superintend, and that such expense should be charged to appellee. Further, the findings are that appellant had appropriated all the profits from the roads completed to its own use and was claiming them as its own. A conversion of the funds of a partnership to his own use by one of the partners, and the exclusion

4. of the other partner from their possession, is ground for a dissolution and accounting and a refusal to further continue the relation and to perform the remaining portion of the contract, in spite of contractual provisions to the contrary. *Adams v. Shewalter* (1894), 139 Ind. 178, 38 N. E. 607.

Appellant admits that the contract was one of partnership. Even granting the construction of the contract contended for by appellant,

5. that the profits were not to be divided until all the roads were completed, yet the profits

before that time, from the roads already completed, were equally the property of both partners. There was no right in one of them to exclude the other from their possession and to claim them as his own, and such act was an ample justification for the refusal of the other partner to continue with the contract, if he did so refuse, and the provision in the contract determining his rights in case of his refusal to continue in its performance could not apply where such refusal was occasioned by appellee's unlawful conduct. Judgment affirmed.

NOTE.—Reported in 112 N. E. 244. Dissolution of partnership, destroyed confidence between partners as ground, 69 Am. St. 423; 30 Cyc 447, 657, 712.

BUTLER ET AL. v. CITY OF KOKOMO ET AL.

[No. 9,094. Filed June 27, 1916.]

1. EMINENT DOMAIN.—*Public Improvements.—Change of Grade of Street.—Liability to Abutting Owners.*—It is the general rule, in the absence of a statute allowing compensation or unless there is damage due to negligence, that an abutting property owner cannot recover damages occasioned by a change of grade of a street or alley in the improvement of the same by the city authorities. p. 525.
2. EMINENT DOMAIN.—*Streets.—Appropriation to New Use.—Compensation.—Electric Railways.*—The construction of a street or interurban railroad upon a public street or alley is not a new and additional servitude entitling an abutting property owner to compensation for such occupancy. p. 525.
3. MUNICIPAL CORPORATIONS.—*Public Improvements.—Power of Board of Public Works.—Grade of Street.*—Under §8696 Burns 1914, Acts 1905 p. 278, the board of public works of a city has the authority, in the improvement of streets or alleys, to change the grade thereof. p. 525.
4. EVIDENCE.—*Presumption.—Board of Public Works.—Official Acts.*—A city board of public works, being a statutory body, is presumed to have conformed to the provisions of the statutes in improving and changing the grade of a street. p. 526.
5. EMINENT DOMAIN.—*Change of Street Grade.—Street Railway.—Liability.—Power of Board of Public Works.*—A street railway company is liable to an abutting property owner for special dam-

- ages resulting from a change in the grade of a street made solely for its accommodation and benefit, and the company will not be relieved of liability because such change in grade was made pursuant to the authority of the board of public works, since that body has no power to authorize special injury to private property. p. 526.
6. EMINENT DOMAIN.—*Change in Street Grade.—Compensation.—Street Railway.—Liability.*—Where a street railway company adjusts its roadbed to conform to a newly established grade of a street, as fixed by a city board of public works, it is not liable in damages to an abutting property owner, since the injury under such circumstances would be occasioned not by its act or conduct but by the city in changing the grade of the street. p. 526.
7. MUNICIPAL CORPORATIONS.—*Public Improvements.—Board of Public Works.—Discretion to Change.*—While a city board of works has no authority to change the general plan of a public work, yet there is necessarily lodged in such bodies a discretionary power which may be exercised in making such changes in public improvements, during the progress of the work, as are for the betterment of the improvement. p. 526.
8. EVIDENCE.—*Presumption.—Board of Public Works.—Official Acts.*—Where changes are made in a public improvement by a board of public works during the progress of the work, it is presumed that the board acted in good faith. p. 527.
9. PLEADING.—*Facts and Conclusions of Law.—Fraud.*—In an action for damages occasioned by a change in the grade of a street during the progress of its improvement, a bare allegation in the complaint that such change was made wrongfully and unlawfully is not equivalent to a charge of fraud. p. 527.
10. EVIDENCE.—*Presumption.—Changes in Public Improvement by Board.—Assessment of Benefits.—Effect of.*—Where, in the improvement of a public street, there has been, after the completion of the work, an assessment of benefits to property affected, as provided by §8716 Burns 1914, Acts 1909 p. 423, it is presumed that any special damage to abutting property occasioned by the improvement was properly adjusted in the fixing of the assessment. p. 527.

From Howard Circuit Court; *William C. Purdum*, Judge.

Action by Maude S. Butler and another against the city of Kokomo and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

Blackledge, Wolf & Barnes and *Overson & Manning*, for appellants.

Joseph C. Herron and Bell, Kirkpatrick & Voorhis,
for appellees.

MORAN, J.—The question for consideration in this cause is one purely of law arising upon the sustaining of a demurrer to the second amended complaint, hereafter styled the complaint, and which in substance alleges: That appellee city of Kokomo is a municipal corporation organized under the laws of the State of Indiana, and that the appellee Kokomo, Marion & Western Traction Company is a corporation engaged in the general passenger traffic, owning a line of street railway within the city of Kokomo and especially upon Sycamore street in said city; that in the years of 1909 and 1910 it also operated a line of interurban railway from the city of Kokomo to the city of Marion and continued to operate such line until December 7, 1912, when appellee Kokomo, Marion & Western Traction Company and the Kokomo Public Utility Company consolidated under the name of the Indiana Railway & Light Company, the latter acquiring all of the property and assets of the former and assuming all liabilities thereon, including the claim of appellants; that for more than ten years prior to the commencement of the action, appellants were the owners of certain real estate in the city of Kokomo, which abuts upon said street, and upon that part of Sycamore street where appellants' property abuts and for a long distance east and west thereof; that appellee Kokomo, Marion & Western Traction Company owned and controlled a line of railway in the middle of the street, and operated the same for several years prior to December 7, 1912, and since the last mentioned date the same has been operated by appellee Indiana Railway & Light Company; that continuously for more than twenty-

five years Sycamore street has been improved and used by the traveling public, and for such period of time the grade line of the street has been established, and appellants have improved their property in conformity therewith. On March 24, 1909, appellee city of Kokomo adopted a resolution calling for the reimprovement of Sycamore street, and pursuant thereto such steps were taken, surveys had, plans and specifications adopted and the improvement ordered that a grade line was established in front of appellants' premises in conformity to the old grade line, which had theretofore been established for more than twenty years; the improvement ordered and the grade lines established were such as to fully accommodate and meet all the requirements of the public; that, on July 14, 1909, a contract for the improvement was entered into and the plans and specifications adopted by the city were made a part thereof; but, before the contractors began work, appellee city of Kokomo and appellee Kokomo, Marion & Western Traction Company, for the purpose of giving the latter an advantage, wrongfully and unlawfully entered into a contract by which appellee city of Kokomo agreed, for the sole benefit of appellee traction company, to lower the grade of Sycamore street, on which appellants' property abuts, and for a long distance east and west thereof; that the grade was lowered some twelve inches by reason of the agreement, upon that portion of the street upon which appellant property abuts, and that the access to and from appellants' premises was destroyed for all practical purposes. That appellants protested to the changing of the grade, but without avail; that the change was made for the purpose of enabling appellee traction company to operate larger cars than it had operated theretofore, although the grade theretofore was

sufficient for the purpose of operating the cars of appellant company over and upon the street; that appellee traction company agreed to pay the contractors for all additional cost occasioned by the change and to pay all damages that might in any way be sustained by the owners of property abutting upon the street, for which appellee traction company might be liable in law, and gave bond to the appellee city to do so. No steps were taken by the appellee traction company to condemn the real estate utilized by it in the manner stated, nor to assess the damages appellants' property sustained. By the lowering of the grade in the manner in which it was done, appellants allege that they have been damaged in the sum of \$3,000.

Appellants' main reliance for reversal of the judgment is that there is enough in the complaint, by proper averments, to disclose that the ingress and egress to appellants' property was greatly impaired from which they suffered damages for the sole benefit of the appellee traction company, and not for the benefit of the public; that, without the lowering of the grade of the street, it served the purpose well as a public thoroughfare, and that the lowering of the grade in the manner alleged amounts to the taking of property without due compensation within the meaning of the Constitution of the State; and the fact that it was done under an ordinance, and by contract between the city and appellee traction company, can not relieve appellees from answering to the damages alleged to have been sustained by appellants.

On the other hand, the objections urged by appellees to the complaint are numerous, but which in an abbreviated form are: That the complaint fails to disclose by proper averment that the lowering of the grade of the street was not a part of the

improvement as ordered, and as an incident thereto, and that in the absence of a statute no damage can be recovered for injuries resulting in consequence of an improvement thus ordered; that the complaint fails to disclose that the lowering of the grade of the street was not a work of public utility, and that it was for the private benefit of appellee traction company; that appellants' remedy was by appeal from the action of the board of public works; that the attack here is a collateral one and therefore futile; further, that there is not enough in the complaint to show that the grade of the street had been established before the passing of the ordinance ordering the improvement; that the injury to the property under the circumstances alleged in the complaint is not the taking of property without due compensation within the meaning of the Constitution.

For many years there was a statute in force in this state (Acts 1867 p. 33, §3073 R. S. 1881), which provided that, when the grade of any street or alley had been established by the city authorities, the grade could not be changed without first paying the damages occasioned by such change to the parties injured. This statute was repealed by an act passed by the general assembly in 1905, concerning municipal corporations. Acts 1905 p. 219, §8975 Burns 1914 *et seq.*; *Morris v. City of Indianapolis* (1911), 177 Ind. 369, 94 N. E. 705, Ann. Cas. 1915A 65. However, by an act approved March 6, 1911 (Acts 1911 p. 539, §3710a Burns 1914), the statute allowing compensation for injury resulting from the change of a grade of a street theretofore established was re-enacted, except it does not include cities of the first, second and third classes. The improvement under consideration was constructed subsequent to the repeal and prior to

the re-enactment of this statute, and in the absence of such a statute, or negligence (*City of*

1. *Indianapolis v. Williams* [1914], 58 Ind. App. 447, 108 N. E. 387), it may be stated as a general proposition that an abutting property owner can not recover damages occasioned by the change of a grade of a street or alley in the improvement of the same by the city authorities. *Weis v. City of Madison* (1881), 75 Ind. 241, 39 Am. Rep. 135; *Hirth v. City of Indianapolis* (1897), 18 Ind. App. 673, 48 N. E. 876; 28 Cyc 1065, 1069.

The construction of a street or interurban railroad upon a public street or alley not being, under the holdings of this state, a new and additional servitude such as to entitle an abutting property owner to compensation for such occupancy (*Mordhurst v. Fort Wayne, etc., Traction Co.* (1904), 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. 222, 2 Ann. Cas. 967; *Kinsey v. Union Traction Co.* [1907], 169 Ind. 563, 81 N. E. 922; *Pittsburgh, etc., R. Co. v. Muncie, etc., Traction Co.* (1909), 174 Ind. 167, 91 N. E. 600), appellant, if entitled to recover, must do so by reason of some special injury suffered; and, if the injury appellants allege to have suffered is in consequence of an improvement ordered by the board of public works of the city of Kokomo, they would not be entitled to recover, the complaint not proceeding upon the theory that the work was negligently and unskillfully done, and there being no statute, as we have seen, awarding damages to an abutting property holder by reason of the changing of a grade of a street at the time this improvement was ordered.

It is within the authorized power of the board of public works to change the grade of the

3. street or alley in the improving of the same (§8696 Burns 1914, Acts 1905 p. 278; *Hirth v. City of Indianapolis, supra*) and, being a public

statutory body, it has back of it the presumption of law that it did its duty and, in the case

4. at bar, that it acted in conformity to the statutory provisions in reference to the improvement of the street and the change of the grade. *City of Logansport v. Webster* (1909), 45 Ind. App. 499, 91 N. E. 36; *Racer v. State, ex rel.* (1892), 131 Ind. 393, 31 N. E. 81; *Slaughter v. State, ex rel.* (1892), 132 Ind. 465, 31 N. E. 1112. The change of the grade of the street, however, must have been for the public welfare, and not for the accommo-

5. dation and benefit of appellee traction company and, if done solely for its accommodation and benefit, the fact that it appears to have been done pursuant to authority of the board of public works would not relieve appellee traction company from answering for special damages resulting to appellants for its benefit, as the board could not legally authorize it to specially injure appellants and escape liability. *Egbert v. Lake Shore, etc., R. Co.* (1893), 6 Ind. App. 350, 33 N. E. 659; *Indianapolis, etc., R. Co. v. State, ex rel.* (1871), 37 Ind. 489; *Chicago, etc., R. Co. v. Johnson* (1909), 45 Ind. App. 162, 90 N. E. 507.

On the other hand, if the appellee traction 6. company adjusted its roadbed in order to conform to the newly established grade of the street, as fixed through the board of public works, it could not be liable to appellants, as the injury under such circumstances would not be occasioned by its act or conduct, but by the city in changing the grade of the street. *Chicago, etc., R. Co. v. Johnson, supra.*

By reason of the discretionary power necessarily lodged in such bodies as boards of public 7. works, they may make such changes in public improvements under their control and, while in progress, such as become apparent in their

judgment for the betterment of the improvement. This discretionary power does not, however, permit a change in the general plan of the work, but such changes and modifications as fall within their discretionary power wisely exercised. *Alsmeier v. Adams* (1916), 62 Ind. App. 219, 105 N. E. 1033, 109 N. E. 58; *Sims v. Hines* (1890), 121 Ind. 534, 23 N. E. 515; *Board, etc. v. Gibson* (1901), 158 Ind. 471, 63 N. E. 982. And where changes

of this character are made, there is a pre-

8. sumption in favor of such bodies that they acted in good faith. In the case at bar, there is no charge of fraud or corruption on the

9. part of the board of public works in making the change in the grade of the street; the bare allegation that it was done wrongfully and unlawfully is not equivalent to a charge of fraud.

In the assessment of benefits under the statute (§8716 Burns 1914, Acts 1909 p. 423), for an improvement such as is here under consideration,

it is provided that, in the making of assess-

10. ments against lots or parcels of land, said board of public works shall, as soon as any contract for the improvement of any street or alley has been completed, cause to be made out an assessment roll of the property bordering on the street or alley improved. Hence, the assessment of benefits to appellants' property was made after the change of the grade of the street, as disclosed by the pleading; and it seems to be the law that, where property is assessed for benefits and it is specially damaged by the improvement, there is a presumption that the same was properly adjusted in the fixing of the assessment. 28 Cyc 1079; *Gas Light, etc., Co. v. City of New Albany* (1901), 158 Ind. 268, 63 N. E. 458.

This is not a suit seeking equitable relief by

Globe, etc., Ins. Co. v. Indiana Reduction Co.—62 Ind. App. 528.

injunction to prevent the board of public works from entering into an illegal contract, or to prevent the carrying out of the same, but for damages to abutting property after the improvement of the street is completed. *City of Indianapolis v. Maag* (1914), 57 Ind. App. 493, 107 N. E. 529; *State, ex rel. v. Board* (1905), 165 Ind. 262, 74 N. E. 1091, 6 Ann. Cas. 468; *Board v. Pashong* (1907), 41 Ind. App. 69, 83 N. E. 383. And further, after a hearing before the board of public works as to the assessment of benefits, a right of appeal is provided to the circuit or superior court of the county in which the city or town is located wherein the improvement has been made, therefore, under the statute, appellant had a remedy by appeal. §8716 Burns 1914, *supra*. In the light of the authorities and the statutory provisions referred to, the court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

NOTE.—Reported in 113 N. E. 391. Change of grade of street, rights of abutting property owner as to damages, 14 L. R. A. 371; 15 Cyc 662, 676. Use of street, additional burden, 17 L. R. A. 477; 4 L. R. A. (N. S.) 202; 36 L. R. A. (N. S.) 698; 40 L. R. A. (N. S.) 254. See under (5), (6) 15 Cyc 664.

THE GLOBE & RUTGERS FIRE INSURANCE COMPANY
v. THE INDIANA REDUCTION COMPANY.

[No. 9,059. Filed June 27, 1916.]

1. APPEAL.—*Briefs*.—*Waiver of Assigned Errors*.—Such assigned errors as are not mentioned or referred to in the points and authorities in appellants' brief are waived. p. 531.
2. APPEAL.—*Review*.—*Findings*.—*Sufficiency of Evidence*.—Where there is any evidence fairly tending to support each of the elements necessary to sustain the decision of the trial court, the case will not be reversed for insufficiency of the evidence. p. 534.
3. INSURANCE.—*Knowledge of General Agent*.—The knowledge of the general agent of an insurance company of facts material to the risk, such as the assured's use of gasoline contrary to the provisions of the policy, will be imputed to the company. p. 538.

Globe, etc., Ins. Co. v. Indiana Reduction Co.—62 Ind. App. 528.

4. **INSURANCE.—Knowledge of Broker.**—The knowledge of an insurance broker relating to the risk, obtained while acting in the scope of his authority as agent of the insurance company, is binding on the company, though not communicated to it. p. 539.
5. **INSURANCE.—Knowledge of Insurance Company.—Waiver.—Issuance of Policy.—Existing Breach.**—Where an insurance company at the time it issues a policy of insurance, has actual or constructive knowledge of the use of gasoline on the assured's premises, which is prohibited by the policy, the company, by issuing the policy with such knowledge, thereby waives the prohibitive condition therein, and it cannot afterwards avail itself of such condition in its policy in defense of an action to recover thereon. p. 540.
6. **INSURANCE.—Issuance of Rider.—Waiver.**—Where, in an action to recover on policies of insurance, the evidence showed that the defendant company, with both actual and constructive notice that the assured, although prohibited by the policies, used gasoline on his premises, placed riders on such policies by which the insurance originally written was redistributed and new property included, such riders constituted a new policy of insurance within the rule that where an insurer issues a policy of insurance with knowledge of the violation of a prohibitive condition contained therein, the same is waived. p. 541.
7. **INSURANCE.—Usage of Business Insured.—Presumption.**—An insurance company is charged with the duty of informing itself as to the usages of the particular business insured, and it will be presumed that the company has such knowledge. p. 542.
8. **INSURANCE.—Actions.—Sufficiency of Evidence.—Knowledge of Insurer.**—Where, in an action to recover on insurance policies, the defendant interposed the defense that the policies were void because the assured violated a provision contained in the policies forbidding the use of gasoline on his premises, there was sufficient evidence to sustain the finding of the trial court for the plaintiff where it was shown that the insurer had knowledge, both actual and constructive, of the use of gasoline by the assured in his plant, both before and at the time riders redistributing the original insurance and including new property were attached to the policies sued on, the prohibitive clause as to the use of gasoline being, therefore, waived. p. 543.

From Marion Circuit Court (21,965); *Charles Remster*, Judge.

Action by the Indiana Reduction Company against the Globe & Rutgers Fire Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

James Bingham, John B. Elam, J. W. Fesler, Harvey J. Elam and Remster A. Bingham, for appellant.

Leander J. Monks, John F. Robbins, Henry C. Starr and James P. Goodrich, for appellee.

HOTTEL, P. J.—This is an appeal from a judgment in appellees' favor for \$4,891.50, in an action brought by it to recover on four insurance policies issued by appellant. These policies, except as to dates and amounts, are identical in their terms. The complaint is in four paragraphs, each of which is based on one of said policies, and such paragraphs are in other respects substantially identical in their averments.

The same defense is interposed to each of these paragraphs of complaint, and consists of an answer in general denial and an affirmative paragraph predicated on a stipulation in the policy which provides that (we quote that part only which has controlling influence on the questions presented by the appeal) the "entire policy unless otherwise provided by agreement hereon or added hereto shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises * * * gasoline." The part of such answer affecting the question presented by this appeal charges that appellee without appellant's knowledge, consent or permission, kept, used and allowed gasoline on the insured's premises, and thereby voided the policy on which its cause of action is based.

To said affirmative answer appellee filed a reply in general denial and a special reply, which, as affecting the question involved, alleged in substance that at the time the policy sued on was

received by appellee it was engaged in the process of degreasing garbage, and that in such process it was necessarily required to keep and use gasoline on the premises insured, as appellant at all times well knew; that it did so keep and use the same under such policy, with the knowledge and consent of appellant and as a necessary part of said business; that it at no time stored, kept, or used more gasoline on said premises than the needs of its business at such times required; and that the gasoline so kept and used did not in any manner cause or contribute to the fire or loss of appellee complained of, and that none of the same was consumed by said fire.

Six alleged errors are assigned in this court, but only the one challenging the overruling of appellant's motion for new trial is mentioned

1. or referred to in appellant's points and authorities. Such other assigned errors are therefore waived. Rule 22, cl. 5. *Macbeth Evans Glass Co. v. Jones* (1911), 176 Ind. 221, 95 N. E. 567; *Bennett v. Root Furniture Co.* (1911), 176 Ind. 606, 96 N. E. 708. The first two grounds of appellant's motion for a new trial, respectively, challenge the decision of the trial court as not being sustained by sufficient evidence and as being contrary to law. By these grounds of its motion appellant presents the same question, which is in fact the controlling question in the case, and upon its determination the result of the appeal depends.

To the end that the questions presented and the respective contentions of the parties hereto may be better understood, we preface a statement of such questions and contentions with a statement of the undisputed facts shown by the evidence and the admission of the parties: On and before December

9, 1911, and up to and including May 25, 1912, the Indianapolis Desiccating Company (hereinafter referred to as I. D. Co.), a corporation, owned certain buildings, machinery and personal property connected with and constituting a garbage reduction plant located on leased premises known as the Seller's farm near the city of Indianapolis. During this period four policies of insurance were issued by appellant on said property in favor of said I. D. Co., viz., two policies for \$1,000 each for one year, beginning at noon December 9 and 19, 1911, respectively; one for \$500 and another for \$2,000, beginning at noon, March 14 and May 20, 1912, respectively. These policies were written through George M. Cobb & Company. Later the rider hereinafter referred to was attached to each of said policies, and they, as respectively changed and modified by such rider, are the policies on which appellee's several paragraphs of complaint are respectively based. On May 26, 1912, the I. D. Co. sold, assigned and transferred its plant and the property connected therewith to appellee, the Indiana Reduction Company, hereinafter referred to as the I. R. Co., and on the same day, by written assignment entered on the back of each of said policies, assigned its interest as owner of the property covered by such policies to the I. R. Co., subject to appellant's consent, which assignment was on the same day consented to in writing by appellant, through its said agent, George M. Cobb & Company. Appellee, after purchasing said garbage reduction plant, made additions to and improvements therein, and changed it to what is generally known as a degreasing plant; that is to say, instead of depending on hydraulic pressure alone for taking the oil and grease out of the garbage, they used gasoline as a solvent for such

purpose. After making these changes and improvements in its plant, additional insurance was desired, and obtained with different companies, through the agency of the Security Trust Company of Indianapolis, acting as a broker for that purpose. Through negotiations between such broker and appellant's agent on August 1, 1912, a rider bearing the heading "Indiana Reduction Company" was attached to each of said policies. On August 25, 1912, the property was consumed by fire. In so far as the property covered by the policies sued on are involved the loss was total, and proper proof thereof was made, and was not paid.

As before indicated, for the purposes of the questions presented by this appeal, appellant's sole defense rests on its claim that appellee voided the policy sued on by keeping and using gasoline on the insured premises. Appellee concedes that gasoline was used and stored in a tank on said premises, but insists in effect that the placing of the rider on the policies originally issued was in effect the making of a new contract of insurance as of that date, and that at that time and before appellant actually and constructively knew that gasoline was being used on said premises, and hence has waived its right to avoid or defend an action on such policies on the ground of a breach of said condition.

It seems to be appellant's contention that the question of the waiver of the provision of the policy prohibiting the use of gasoline on said premises should be determined from conditions as they existed when the insurance was originally issued, and from appellant's knowledge at that time, and that the evidence shows without contradiction that gasoline was not then used on the premises. It is further contended by appellant

Globe, etc., Ins. Co. v. Indiana Reduction Co.—62 Ind. App. 528.

that the evidence fails to show that it either actually or constructively knew, at any time before the fire, that gasoline was in fact being kept and used on the insured premises; that the policy expressly prohibits the use or presence of gasoline on the premises without the permit of appellant, and that such permit was not shown, either by the rider or by any other evidence in the case.

In setting out the evidence, pertinent to and affecting said question, it will suffice to set out that most favorable to appellee, because, where there is any evidence fairly tending to support each of the elements necessary to sustain

2. the decision of the trial court, such decision will not be reversed on the ground of the insufficiency of the evidence. *Indiana, etc., Traction Co. v. Keiter* (1910), 175 Ind. 268, 92 N. E. 982; *Chicago, etc., R. Co. v. Hamerick* (1911), 50 Ind. App. 425, 96 N. E. 649. In addition to the undisputed facts, *supra*, there was evidence affecting said question favorable to appellee in substance as follows:

George M. Cobb testified in substance as follows: I am now, and, when the policies in suit were issued was, president of George M. Cobb & Company, a corporation engaged in the insurance business, and as such issued said policies and signed them "George M. Cobb and Company, General Agents." My company has been appellant's state or general agent at Indianapolis for eleven years, and was also its local agent at said city, and was such general or state agent and local agent when the policies in suit were issued and the rider, headed "Indiana Reduction Company," was attached thereto. All of said riders were signed by "George M. Cobb & Company, Agents," etc. The signature seems to be that of Mr. Holland, an employe of such com-

pany, who had authority to so sign such riders. The stamp appearing at the bottom of each of said riders, containing the words, "This form substituted for all other forms from this date, August 1, 1912", looks like the stamp of our company. The insurance covered by these policies was placed by other agents, who acted as brokers and received part of the premiums. It is customary for the placing agent or broker to prepare the form, and when such form is received by the agent of the insurance company and signed by him he has then "committed his company." The placing agent or broker brings his business in and seldom requests that it be placed with any particular company but intends that we shall write it in some of our companies. Insurance policies are written on the rate that is made up by the "Inspection Bureau." The business of this bureau is that of "furnishing us estimates for which we were paying a subscription * * * estimates of hazards and rates." In fixing the rate this bureau visited and examined the property and the risk. Permission is given to use ten gallons of gasoline without additional charge. Above this amount there is a charge on these estimates. We do not go into that, but if there is gasoline on the premises it is on the estimate card. About two years ago some question came up about appellee's plant using gasoline. Appellant wanted to know the process by which this plant handled its product. There was a squeezing process and a gasoline process, and appellant inquired whether this plant was using the process where they used gasoline, or the other process. Mr. McMurray is connected with the Indianapolis Inspection Bureau. This bureau makes the estimates and publishes them. When it makes the estimates it sends out its men who examine the property for

that purpose. The bureau recommends a rate. The insurance company buys what the bureau delivers to it. The bureau furnishes the subscriber its estimate or rate card.

Jesse T. Moorman testified in substance as follows: Have been president of appellee company since its organization. Our company took over the plant of the I. D. Co., and put in new buildings and machinery and changed the process of treating garbage from the old process of pressing to the degreasing process in which gasoline is used as a solvent, and began to operate under the new process June 14, 1912. Some time in the latter part of June, 1912, and after we changed to the degreasing process, I had two conversations with Mr. Cobb, one of which was over the phone, at a time when he called me up and wanted to place this line of insurance. The second conversation occurred at the Columbia Club, after we began the use of gasoline at the plant, where Mr. Cobb again solicited the line of insurance and suggested that it be placed through the Peoples Loan and Trust Co., of Winchester, Indiana, such trust company thereby getting part of the premium and Mr. Cobb part. I inquired the rate of insurance and he said he did not know just what it would be; that he would not know the rate until the Indianapolis Inspection Bureau fixed it, and when so fixed it would be written by all companies alike. I told him we had changed our process and "was putting in and having a new degreasing—was using gasoline for the extracting of grease in place of the hydraulic presses as had formerly been used by the old company." I also told him that I thought we would let the Security Trust Company place the line of insurance. The conversation was about the insurance, but not about the in-

insurance already placed. We then had the policies sued on. They had been assigned to us. I was asking about new policies. We were figuring on increasing our insurance to \$50,000. When I told him about our use of gasoline he said that would be a matter for the Indianapolis Inspection Bureau to pass on. I told him that they, Mr. Moore and Mr. McMurray, had already been out and made the inspection, and he said when they fixed the rate he would tell me and let me know. This conversation was before the riders were attached to the policies. The riders were attached to said policies August 1, 1912, and were prepared by Mr. Fitzgerald and Mr. McBride, who came out to the plant and "took their own data." They prepared the form. All I did was to make some changes on their value of the property. Mr. McBride acted as the agent of the Security Trust Company, *which company was not my agent but was the agent of the insurance companies.* We were using gasoline when Mr. McMurray and Mr. Moore were at the plant. Mr. Moore was there when two carloads of gasoline came in. They were there for the "Indianapolis Bureau of Inspection" for the purpose of inspecting and fixing the rate that would be charged for insurance and they then knew we were using gasoline. We were using gasoline when Mr. Fitzgerald and Mr. McBride were there making up this form; I mean the rider, which was attached to these policies, and they then knew we were using gasoline.

Mr. McBride testified in substance as follows: I have charge of the insurance department of the Security Trust Company which, as a broker, placed this line of insurance. I acted for the broker and visited appellee's plant several times and got information for preparing the riders and prepared

them. I took the forms to Mr. Cobb's office for his signature, one form to be attached to the policy, one for his office and one to be sent to the home office of appellant. The riders were there signed and approved. I saw and knew that appellant was using gasoline in its place for degreasing purposes. I saw two or three carloads of gasoline there. At the time this rider was attached I talked to Mr. Cobb in regard to writing additional insurance at this plant, and the amount, and the hazard, and the conditions of the plant were discussed in general. "I told him they were using gasoline there at the present time." I distributed the insurance of the various companies over the different buildings and put the different provisions in the rider. My failure to put in the rider a permission to use gasoline was "an oversight." I saw the gasoline in the tank at the plant. I received from the Security Trust Company a part of the premiums received from the insurance companies.

It will appear from the above testimony that two witnesses testified positively that appellant's general and local agent, George M. Cobb, was told, before and at the time the riders were attached to the policies in suit, that appellee was using gasoline at its plant. The knowledge of the general

agent of an insurance company of facts

3. material to the risk is the knowledge of the company. *Indiana Ins. Co. v. Hartwell* (1890), 123 Ind. 177, 194, 24 N. E. 100; *West v. National Casualty Co.* (1915), 61 Ind. App. 479, 112 N. E. 115, 119, and cases cited.

The undisputed evidence shows that the inspectors of the Indianapolis Bureau of Inspection inspected appellee's plant and knew that gasoline was being used therein when it made the estimates or rates which it fixed for use by the insurance

companies who were its subscribers. Appellant was one of its subscribers. The rate at appellee's plant was increased and there seems to be no question but that such rate or estimate, when fixed by such bureau, was fixed with reference to the use of gasoline at such plant, and that the rate adopted by such bureau was the rate accepted and used by the various insurance companies when said additional insurance was written on such plant and the riders attached to the policies in suit. Furthermore, the insurance broker, the Security Trust Company, according to Mr. Moorman's testimony, *supra*, was appellant's agent. Such trust company through its agent, Mr. McBride, placed the additional insurance and attached the riders to the policies in suit. Mr. McBride expressly states that, when such additional insurance was placed and the riders prepared and attached to the policies, he knew that gasoline was then being used at the plant and that such riders did not contain a permit for such use because of an oversight. The knowledge of the insurance broker relating to

4. the risk, obtained while acting in the scope of its authority as agent of the insurance company, is binding on the company, though not communicated to it. *Western Ins. Co. v. Ashby* (1913), 53 Ind. App. 518, 523, 102 N. E. 45; *German Fire Ins. Co. v. Greenwald* (1912), 51 Ind. App. 469, 99 N. E. 1011; *Indiana Ins. Co. v. Hartwell*, *supra*; *West v. National Casualty Co.*, *supra*.

It must appear from the evidence above indicated, and the decisions, *supra*, applicable thereto, that there was at least some evidence to warrant the trial court in concluding that appellant, through its duly authorized agents, had actual knowledge of appellee's use of gasoline at its plant before and at the time said riders were attached to the

policies in suit. Where the insurance company, at the time it issues a policy of insur-

5. ance, knows, or under the law is chargeable with notice of the use of gasoline or any other substance, the use or presence of which on the premises is prohibited by the terms of the policy so issued by it, the company, by accepting and issuing the policy with such knowledge, thereby waives the prohibitive condition in the policy as to the presence or use on the insured premises of such known substances, and can not afterwards, as to the known prohibited substance, avail itself of such condition in its policy in defense of an action to recover on the policy. Upon this subject the Supreme Court in the case of *Ohio Farmers Ins. Co. v. Vogel* (1905), 166 Ind. 239, 245, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. 382, 9 Ann. Cas. 91, said: "Such provisions in insurance policies have been before the courts a great many times, and, so far as we have observed, courts have everywhere, in the absence of fraud, refused to enforce a condition of forfeiture in favor of an insurer who has knowledge of the condition broken when he delivered the policy." See, also, *German-American Ins. Co. v. Yeagley* (1904), 163 Ind. 651, 71 N. E. 897, 2 Ann. Cas. 275; *Glens Falls Ins. Co. v. Michael* (1906), 167 Ind. 659, 678, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *Lancaster Silver Plate Co. v. National, etc., Ins. Co.* (1895), 170 Pa. 151, 32 Atl. 613, 50 Am. St. 753; 13 Ann. Cas., note and cases cited 541, 542; 2 Ann. Cas. 275, and cases cited pp. 280-283.

From the evidence, *supra*, it will be seen, also, that in addition to the evidence of actual knowledge there was also evidence from which the trial

court might have very properly inferred that appellant should be charged with constructive

6. knowledge of such use of gasoline on the premises by appellee. The riders placed on the policies in suit bore the heading "Indianapolis Reduction Company." By them the insurance originally written was redistributed, and property was included therein which was not covered by the policies as originally written. These riders, therefore, at least for the purpose of the question under consideration, had the effect of making a new contract of insurance. *Corporation, etc. v. Paterson, etc., Co.* (1898), 106 Ga. 538, 542, 32 S. E. 650; 7 Am. and Eng. Ency. Law (1st ed.), 1011, 1012; *Liverpool, etc., Ins. Co. v. Agricultural, etc., Loan Co.* (1903), 33 Can. S. C. 94. Among the items of property appearing in said rider which were not in the policy as originally written were the following: A "frame gravel roof building with additions and projections known as a *degreasing room*," also, a "*degreasing tank*." Several witnesses who claimed to have knowledge of such matters testified that the word "degreasing" when used in connection with the reduction of garbage signified the process of extracting grease from garbage by the use of gasoline; that the business of *degreasing* garbage could not be successfully conducted without the use of gasoline or naphtha as a solvent, and that for a number of years the principal garbage plants had been operating under the degreasing process by the use of said substances. One or more witnesses testified that the use of gasoline was necessary in such a *degreasing* plant.

The law charges insurance companies with the duty of informing themselves as to the usages of the particular business insured, and a knowledge

of such usage on the part of such company will be presumed. *Grant v. Lexington, etc., Ins. Co.*

7. (1854), 5 Ind. 23, 61 Am. Dec. 74; *Toledo, etc., Ins. Co. v. Speares* (1861), 16 Ind. 54, 55, and cases cited; *Traders' Ins. Co. v. Dobbins* (1904), 114 Tenn. 227, 86 S. W. 383; *Bouchard v. Dirigo, etc., Ins. Co.* (1915), 113 Me. 17, 24, 92 Atl. 899, L. R. A. 1915D 187, and cases cited; *McClure v. Mutual, etc., Ins. Co.* (1913), 242 Pa. 59, 88 Atl. 921, 48 L. R. A. (N. S.) 1221; 12 Cyc 1066, 1067, 1068 and notes; *McKeesport Machine Co. v. Ben Franklin Ins. Co.* (1896), 173 Pa. 53, 34 Atl. 16; *W. & A. Pipe Lines v. Insurance Co.* (1891), 145 Pa. 346, 22 Atl. 665, 27 Am. St. 703, and cases cited; *City of New York v. Hamilton Fire Ins. Co.* (1863), (10 Bosworth), 23 N. Y. Sup. Ct. 537, 551, 553; *Faust v. American Fire Ins. Co.* (1895), 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. 876, 877, and cases cited; *Daniels v. Hudson River Fire Ins. Co.* (1853), 12 Cush. (Mass), 416, 59 Am. Dec. 192, 200, 201; 3 Cooley, Briefs on Insurance, 2549; 29 Am. and Eng. Ency. Law 393-396, and notes 1, 2 p. 396. In the case of *Faust v. American Fire Ins. Co.*, *supra*, the court said: "Where a contract of insurance, by the written portion, covers property to be used in conducting a particular business, the keeping of an article necessarily used in such business will not avoid the policy, even though expressly prohibited in the printed conditions of the contract." *Davis v. Pioneer Furniture Co.* (1899), 102 Wis. 394, 78 N. W. 596. In *Lancaster Silver Plate, etc., Co. v. National, etc., Ins. Co.*, *supra*, 163, the court said: "The general rule, deducible from the text books and adjudicated cases, as to such prohibitions, is, that it is the intent of the parties to insure the subject of insurance as it necessarily is and must continue to be during the

life of the policy." We are of the opinion that, under the law as expressed in the authorities 8. cited, *supra*, there was evidence sufficient to warrant the trial court in finding that appellant had knowledge, both actual and constructive, of the use of gasoline by appellee in its plant, both before and at the time said riders were attached to the policies sued on, and hence that the provision of the policy prohibiting such use was waived by appellant.

It is also insisted by appellee that appellant has waived its right to insist upon the defense made by it because of its failure to tender back the premium or any part thereof paid by appellee, but in view of our conclusion, *supra*, we need not further extend this opinion by consideration or determination of such question. As affecting the question, however, we cite the following cases recently decided by the Supreme Court and this court: *Ohio Farmers' Ins. Co. v. Williams* (1916), Ind. App.—, 112 N. E. 556; *Aetna Life Ins. Co. v. Bockting* (1906), 39 Ind. App. 586, 79 N. E. 524; *Western Ins. Co. v. Ashby* (1913), 53 Ind. App. 518, 523, 102 N. E. 45, and cases cited; *Metropolitan Life Ins. Co. v. Johnson* (1911), 49 Ind. App. 233, 241, 94 N. E. 785; *United States, etc., Co. v. Clark* (1907), 41 Ind. App. 345, 351, 83 N. E. 760, and cases cited; *Glens Falls Ins. Co. v. Michael*, *supra*.

No reversible error is presented by the record. Judgment affirmed.

NOTE.—Reported in 113 N. E. 425. Insurance, waiver of stipulation in policy, constructive notice to company, 107 Am. St. 108; 19 Cyc 807, 809, 817.

WARNER ET AL v. REED.

[No. 9,052. Filed June 28, 1916.]

1. **APPEAL.—Review.—Briefs.—Specification of Errors.**—Where appellant's brief, in its points and authorities, states several propositions of law, none of which are applied to any particular ruling of the trial court or to any assigned error, there is a failure to comply with the rules of the Supreme and Appellate Courts and no question is presented on appeal. p. 547.
2. **APPEAL.—Assignment of Error.—Identifying Questions Presented.**—The assignment of error in the appellate court must identify and present for the determination of the court the same question presented and passed upon by the trial court. p. 548.
3. **NEW TRIAL.—Motion.—Grounds.**—The overruling of a motion for a new trial as a matter of right is not a proper ground for a new trial for cause. p. 548.
4. **NEW TRIAL.—As of Right.—Waiver of Objections.**—A motion to vacate an order granting a new trial as of right is too late, if not filed until after the trial granted by such order. p. 548.
5. **NEW TRIAL.—Striking out Motion to Vacate Order for.—When Harmless.**—The action of the trial court in striking out a motion to vacate an order for a new trial was harmless, where such motion was filed too late. p. 549.
6. **NEW TRIAL.—As of Right.—Waiver of Objection.**—Where the cause of action is one in which the losing party is entitled to a new trial as of right, and he has fulfilled the statutory requirements incident to obtaining the same, any irregularity in the granting of the order for the new trial prior to the rendition of the judgment in the first trial will be deemed to have been waived, where the record shows no objection made to such irregularity at the time such new trial was granted and no effort made to set aside the order therefor until after the rendition of the verdict in the second trial of the cause. p. 550.

From Marion Superior Court (20,403); *Pliny W. Bartholomew*, Judge.

Action by Mary L. Reed against John C. Warner and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Bailey & Young, for appellants.

W. E. Henderson and *J. D. Pierce*, for appellee.

HOTTEL, P. J.—Appellee brought this action against the appellants to set aside an alleged

fraudulent deed and to quiet her title to a certain lot in the city of Indianapolis, Indiana. Appellant Warner filed a cross-complaint, in which he sought to quiet his title to the same lot as against appellee and one Harris, his codefendant. There was a trial by jury and a verdict was returned October 31, 1912, in favor of appellant Warner on his cross-complaint against appellee and Harris. At the October term, 1912, appellee filed a motion for new trial for cause, which was overruled at the following December term. At the June term, 1913, appellee filed a motion for a new trial as of right, accompanied by proper undertaking. As part of the record of the proceedings had in said cause at the September term, 1913, of said court, to wit, on September 26, 1913, appears the following entry: "Comes now the parties and the court being fully advised in the premises sustains the plaintiff's motion for a new trial as of right herein, to which ruling of the court the defendants at the time except."

A second trial resulted in a verdict and judgment in favor of appellee and against appellants Warner and Harris. Judgment was rendered in the second trial on December 12, 1913. On December 13, 1913, appellant Warner filed separate motions to vacate the order of court granting a new trial as of right and for a new trial. The motion to vacate the order of court reads as follows: "The defendant John C. Warner, moves the court to set aside and vacate the order and ruling of this court granting a new trial as of right in the above entitled cause and to set aside and vacate the verdict of the jury in this cause for the reason that at the time the court sustained plaintiff's motion for a new trial as of right, no judgment had ever been rendered in the above entitled cause and no authority is

given by statute or otherwise to file a motion for a new trial as of right until after the rendition of the judgment." The motion for new trial contains twenty-seven grounds, the last of which is as follows: "The court erred in sustaining the plaintiff, Mary L. Reed's motion for a new trial as of right, and erred in granting a new trial as of right before the rendition of the judgment in the above entitled cause."

On December 19, 1913, appellee filed a verified motion to strike from the record appellant's motion to vacate, etc., *supra*, and also to strike out the italicized portion of ground No. 27 of his motion for new trial, *supra*. In the entry of the proceedings had in said cause on April 4, 1914, appears the following: "Comes now plaintiff by counsel and by leave of court withdrew motion to strike from files motion of defendant Warner to vacate order of court herein." In the entry of the proceedings had in said cause on May 29, 1914, appears the following: "Comes now the parties and the court being fully advised in the premises sustains the plaintiff's motion to strike from the files the motion of the defendant, Warner, to vacate order of court and parts of motion of defendant Warner for a new trial being specification No. 27, to which ruling of the court the said defendant at the time excepts. The court overrules the motion of defendant, Warner, for a new trial herein, to which ruling of the court, the said defendant at the time excepts and said defendant is allowed thirty days to file bill of exceptions herein."

Five errors are assigned in this court, viz.: "1. The court erred in overruling this appellant's motion for a new trial * * * 2. The court erred in sustaining the motion of appellee, Mary L. Reed, for a new trial as of right before the rendition

of the judgment in this cause. 3. The court erred in sustaining the motion of appellee, Mary L. Reed, for a new trial as of right. 4. The court erred in sustaining plaintiff's motion to strike from the files the motion of appellant, John C. Warner, to vacate the order of the court granting appellee, Mary L. Reed, a new trial as of right. 5. The court erred in striking from the motion of appellant John C. Warner, for a new trial upon the motion of appellee, Mary L. Reed, specification No. 27."

Three points only are stated by appellant in his brief under the heading "Points and Authorities." The first is a statement of the legal proposition that a new trial as of right is not authorized until after judgment, citing §1110 Burns 1908, §1064 R. S. 1881, and cases construing such act. The second point is a statement to the effect that, where an exception is properly saved to a ruling granting a new trial as of right, the party so excepting does not waive his exception by following up another trial, citing cases. There is no application of these legal propositions by any statement or reference to any particular ruling of the trial court, or error

1. assigned or relied on for reversal in this court.

This is not such a compliance with the rules of the court as will present any question for our consideration. *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218, and cases cited. The third point is as follows: "The appellant, John C. Warner, filed his motion to set aside and vacate the order and ruling of the court granting a new trial as of right, and such motion ought to have been sustained by the court for the reason that the ruling of the court granting such new trial as of right was erroneously made."

No reason is given or authority cited in support of the statement that the "granting of such new

trial as of right was erroneously made," but what is more fatal to this point is that it refers to a ruling of the court which is not challenged by either of the assigned errors, *supra*. There is no assignment of error challenging any ruling on appellant's said motion to vacate. Assuming, however, that by such point appellant intended to present for our consideration his fourth assigned error, no available error is presented for either of two reasons: (1) Neither of said motions presented to the trial court, above indicated, are properly identified by such assignment of error. Appellant's motion was not a motion merely to set aside and vacate the ruling of such court granting a new trial as of right, but the motion also asked to have set aside and vacated the verdict of the jury. Appellee's motion in addition to asking to have appellant's said motion to vacate, etc., stricken out, also asked to have stricken out the italicized portion of ground No. 27 of his motion for new trial for cause. The

assignment of error in this court must
2. identify and present for the determination of this court, the same question presented and passed upon by the trial court. *Mesker v. Bishop* (1914), 56 Ind. App. 455, 460, 103 N. E. 492, 105 N. E. 644, and cases cited. (2) The

overruling of a motion for new trial as a
3. matter of right is not a proper ground for new trial for cause, and hence no error would have resulted from striking out all of ground No. 27 of appellant's motion for new trial, *supra*.

Appellant's motion to vacate was not made
4. until after the second trial, and hence was too late. If appellant felt aggrieved by the ruling granting appellee a new trial as of right, and "considered that such order was improperly granted," it was his duty under the facts disclosed by

the record as hereinafter indicated, in the first instance and "at the first opportunity presented to challenge such order for any and all reasons" and demand that it be vacated. *Barber v. Barber* (1900), 156 Ind. 45, 51, 53, 59 N. E. 171, and cases cited; *Stanley v. Dailey* (1887), 112 Ind. 489, 493, 14 N. E. 375; *Hutchinson v. Lemcke* (1886), 107 Ind. 121, 126, 127, 8 N. E. 71; *Marsh v. Elliott* (1875), 51 Ind. 547; *Vernia v. Lawson* (1876), 54 Ind. 485; *Marsh v. Prosser* (1878), 64 Ind. 293, 296, 297; *Butler University v. Conard* (1884), 94 Ind. 353, 354. It therefore also follows that no harm resulted from sustaining that part of

5. appellee's motion which asked to have stricken out appellant's said motion to vacate.

In his argument in his brief, appellant insists that he excepted to the granting of the motion, and that his after appearance in the second trial did not operate as a waiver of the exception. As before indicated, appellant has not by his brief presented the question of his exception to the ruling on such motion. However, as the record comes to us, such ruling, if properly presented, furnishes no ground for reversible error. This is so because it is not claimed that the action is one in which, under the statute, *supra*, appellee was not entitled to a new trial, but the objection goes merely to the question of irregularity in granting the new trial, when there had been no judgment rendered on the first verdict. The record entry does not disclose the ground of objection urged by appellant against the sustaining of such motion, and there is no special bill of exceptions saving the question and presenting the objection. There is nothing in the record from which this court can know that appellant presented to the trial court the ground of objection to the motion that he is

now urging in this court, or that he in fact made any objection to the sustaining of said motion at the time it was presented, or that he took any steps to have the order vacated until after he had taken the chance of a verdict in his favor on the second trial. Where the cause of action is one in which

the losing party is entitled to a new trial as

6. of right, and he has done all that the statute requires him to do, an irregularity in the proceeding, such as is insisted on by appellant, will be deemed to have been waived, where the record shows no objection made to the irregularity at the time such new trial was granted and no effort to set aside such order until after the verdict of the jury in the second trial had been returned. See cases cited, *supra*; also *Inland Steel Co. v. Kiessling* (1914), 183 Ind. 117, 120, 108 N. E. 232.

Finding no error in the record, the judgment below is affirmed.

NOTE.—Reported in 113 N. E. 386.

WALKER ET AL. v. JOHNSON ET AL.

[No. 9,540. Filed June 28, 1916.]

1. APPEAL.—*Notice of Appeal.—Service on Attorney.—Presumption.*—Where an appeal is regularly taken within the statutory period by persons not asserting any legal disabilities, the appellant, in serving notice of the appeal, may presume, until he acquires knowledge to the contrary, that the opposing party's attorney of record in the trial court also represents him on appeal. pp. 553, 554.
2. APPEAL.—*Notice of Appeal.—Service on Attorney.*—Under §681 Burns 1914, §640 R. S. 1881, providing that notice of appeal may be served on the attorney of the adverse party, service of the notice on appellee's attorney in the trial court is invalid and ineffectual to perfect the appeal, where appellant is notified at the time of the service that such attorney no longer represents the appellee. p. 553.
3. APPEAL.—*Notice of Appeal.—Effect of Failure to Give.*—Under Rule 36 of the Supreme and Appellate Courts, a vacation appeal will be dismissed when the cause has been on the docket for ninety

Walker v. Johnson—62 Ind. App. 550.

days or more without an appearance by the appellee where there has been no effort to perfect the appeal nor any steps taken to bring the appellee into court further than to serve him with an invalid and ineffectual notice of appeal. p. 554.

From Hamilton Circuit Court; *James M. Purvis*, Special Judge.

Action by Horace W. Johnson and others against Edith M. Walker and others. From a judgment for plaintiffs and cross-complainant James W. Walker, the defendants appeal. *Appeal dismissed.*

Harry Griffin and *Joseph A. Roberts*, for appellants.

Shirts & Fertig, for appellees.

FELT, J.—The parties named as appellees, other than James W. Walker, have moved to dismiss this appeal for several alleged reasons, one of which is the want of due and sufficient notice. Judgment was rendered on July 17, 1914, on conclusions of law stated on a special finding of facts. The judgment was for the plaintiffs quieting their title to certain real estate and for the cross-complainant James W. Walker quieting his title to other real estate described in his cross-complaint. The appellants, Edith M., Bernard, Chase, and Vern Walker, also filed a cross-complaint asking to have their title quieted to certain real estate, and the court found and adjudged that they take nothing by such complaint.

The transcript was filed in this court on February 25, 1916, by Chase Walker and Bernard Walker. Attached to the transcript is an affidavit of Harry H. Griffin, one of appellants' attorneys, in which he sets forth the fact and date of the rendition of the judgment, and that at that time Chase Walker was, and still is, under the legal disability of being under the age of twenty-one years; that at such

time Bernard Walker was under the legal disability of being out of the United States, which disability continued until September 12, 1915. The record shows proof by affidavit of Joseph A. Roberts, one of appellants' attorneys, that he served a notice of the appeal on Walter R. Fertig, a member of the law firm of Shirts & Fertig, attorneys for the plaintiffs in the original suit, by delivering to him a true copy of such notice on February 11, 1916. The motion to dismiss is supported by the affidavit of Walter R. Fertig, in which he says in substance, that he was an attorney in the original suit for the plaintiffs and for James W. Walker on his cross-complaint; that after the rendition of the judgment, and long prior to February 11, 1916, the services of his firm as such attorneys were fully paid and their employment terminated; that when the notice of appeal was presented to him he refused to acknowledge service thereof as attorney for appellees, and then and there informed said Roberts that he was no longer employed by appellees or either of them; that his fees had been paid, the case closed and his services terminated; that the statute under which appellant sought to serve such notice was not applicable under the facts of this case; that thereupon said Roberts laid a copy of the notice on his desk, stated he would make proof of service by affidavit and left the office. Appellants have filed an additional affidavit showing the legal disability of Chase and Bernard Walker, but the facts relative to the service of the notice and the statement of Mr. Fertig made at the time to the effect that he was not then, and had not been for a long time, the attorney for appellees in said cause are not questioned or controverted in any way.

On this showing, for the purposes of this motion,

two facts must be accepted as conclusively established, viz.: (1) When the attempt was made to serve the notice of appeal on Mr. Fertig, neither Mr. Fertig, nor any member of his firm was attorney for the appellees in this appeal; (2) appellants' attorney who sought to serve it in the manner shown was informed of such fact while attempting to procure an acknowledgment of service of the notice, and before he attempted to serve the notice by leaving a copy with Mr. Fertig under the conditions above shown.

Section 681 Burns 1914, §640 R. S. 1881, provides two ways of serving notice of an appeal, and under the plan adopted by appellants authorizes "service of a notice in writing on the adverse party or *his attorney* and also on the clerk of the court." Where the appeal is regularly taken within the statutory period of 180 days by parties not asserting

- 1 any legal disabilities, the presumption that the attorney of record continues in such relation obtains until the appealing party acquires knowledge to the contrary. But in such appeals the presumption ends with knowledge or notice that the relation of attorney and client has ceased to exist. Where the appealing party has knowledge of the fact, or receives due notice at or
- 2 prior to the time of serving the notice, that the relation of attorney and client has ceased to exist between the attorney of record and the appellees, an appeal can not be perfected by service of the notice upon such attorney. *Thompson v. Newsom* (1912), 52 Ind. App. 444, 446, 100 N. E. 772; *Masters v. Abbitt* (1912), 51 Ind. App. 429, 432, 99 N. E. 815; *Rose v. Owen* (1905), 37 Ind. App. 125, 127, 76 N. E. 412; *Richardson v. Pate* (1884), 93 Ind. 423, 430, 47 Am. Rep. 374. Under the rule above announced, and on the authority

cited we hold the notice invalid, and therefore ineffectual to perfect the appeal. While there is a presumption that the attorney of record

1. in the trial court continues to represent his clients on appeal, the presumption is not conclusive.

As already indicated, the transcript was not filed in this court until more than seventeen months after the rendition of the judgment from which it is sought to appeal. Appellants seek to bring their notice of the appeal within the provisions of §681, *supra*, by the aid of §1356 Burns 1914, §1285 R. S. 1881, which designates the persons who are under legal disabilities. No steps have been taken, or attempt made, to give any other

3. notice or to in any way perfect the appeal.

Appellees have duly challenged the sufficiency of the notice. Rule 36 of this court provides that in vacation appeals a cause that has stood on the docket for ninety days, and there has been no appearance by the appellees, and no steps have been taken to bring them into court, or where an attempted notice proves ineffectual, the appeal shall be dismissed. *Smith v. Hibben* (1915), 59 Ind. App. 438, 107 N. E. 40, 43; *Fort v. White* (1914), 58 Ind. App. 524, 528, 108 N. E. 27; *W. C. Hall Milling Co. v. Hewes* (1914), 57 Ind. App. 381, 383, 105 N. E. 241.

The appeal is dismissed.

NOTE.—Reported in 113 N. E. 314.

MCGEE v. STOCKTON ET AL.

[No. 8,878. Filed June 28, 1916.]

1. *APPEAL.—Review.—Assignment of Error.—Memorandum of Demurrer.*—No question is presented for review by an assignment of error predicated on the action of the trial court in overruling appellant's demurrers where there is a failure to set forth in the briefs the memoranda filed with the demurrers. p. 556.
2. *MASTER AND SERVANT.—Independent Contractor.—Extent of Control.*—Where one lets a contract to another to do a particular work, without having any control over the work or any authority to prescribe how it shall be done and reserving only the right to require that the completed work shall conform to a certain standard, the person so employed is a contractor and not a servant. p. 561.
3. *MASTER AND SERVANT.—Independent Contractor.—Negligence of Master.—Statute.*—Where the plaintiff was employed by the defendant, a manager of a hotel, to test a rope and chain fire escape by sliding down it, as required by §3845 Burns 1914, Acts 1902 p. 305, and in so doing was injured by reason of the breaking of the rope, the defendant, having reserved no authority to prescribe how the work should be done, was not liable, since, under such circumstances, the plaintiff was an independent contractor and not a servant; and §3862d Burns 1914, Acts 1911 p. 509, requiring that materials and appliances used in the operation of buildings be properly safeguarded and tested, would have no application to such case, nor would the fact that the defendant when requested by the plaintiff to ascertain the strength of the appliance, prior to the actual test thereof, failed to do so and assured him that it was amply secure to bear his weight, be material. p. 562.

From Jasper Circuit Court; *Burton B. Berry*, Special Judge.

Action by Landy McGee against Jay W. Stockton and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

George A. Williams and *Philip R. Blue*, for appellant.

W. H. Parkinson and *W. W. Lowry*, for appellees.

McNUTT, J.—This was an action by appellant, McGee, against appellees to recover damages for injuries sustained by him while testing a fire

escape installed by appellees in a hotel owned by them in the city of Rensselaer, Indiana. The complaint was in two paragraphs, and appellees demurred separately to each paragraph. The court sustained appellees' demurrers to the first paragraph, to which ruling appellant duly excepted, and overruled their demurrers to the second paragraph, to which ruling appellees excepted. Separate answers were filed by appellees to the second paragraph of complaint, and demurrers thereto were overruled. Appellant refusing to plead further, judgment was rendered for appellees.

Appellant assigns that the court erred: (1) In sustaining appellees' separate demurrers to the first paragraph of complaint; (2) in overruling appellant's demurrers to appellees' answers to the second paragraph of complaint. Appellees separately assign as cross-error the overruling of their demurrers to the second paragraph of complaint.

Appellant has not set out in his brief the memorandum filed with his demurrers to the answers, if any was ever filed with said demurrers.

1. No question is therefore presented by this assignment of error. *Clevenger v. Clevenger* (1915), 59 Ind. App. 13, 108 N. E. 868; *Quality Clothes Shop v. Keeney* (1914), 57 Ind. App. 500, 106 N. E. 541; and, in view of our conclusion that the court did not err in sustaining the demurrers to the first paragraph of complaint, it will serve no purpose to pass upon appellees' assignment of cross-error. *Baldwin v. Moroney* (1909), 173 Ind. 574, 91 N. E. 3, 30 L. R. A. (N. S.) 761.

It is contended by appellant that his first paragraph of complaint is founded upon the theory of a violation of §4 of the act of 1911 (Acts 1911 p. 597, §3862d Burns 1914), known as the "Dangerous Occupations Act." The material allegations

of this paragraph are, in substance, that in November 1912, appellees Almira M. Stockton and Williams were the owners of a three-story brick building in the city of Rensselaer, known as the Makeever Hotel, which for some time had been used as a public hotel, the landlord being one Fate, who occupied it under a lease from said owners; that appellee Jay W. Stockton was, and for some time had been, their agent and representative in the management, operation and control of the hotel building; that appellees had caused said building to be equipped with fire escapes, consisting of a chain and knotted rope in each room above the ground floor used as a lodging room, the chain being about seven feet long, and one end thereof fastened to the wall of the room at the side of the window in the room, in an effort to comply with the statute providing for fire escapes in hotels and lodging houses; that on the — day of November, 1912, Jay W. Stockton, acting as such agent and representative of the owners, came to appellant, and informed him that the state authorities required that the owners of the hotel in question have some one slide or come down the fire escapes in said building, and a report thereof be made in writing to said state authorities, and that he desired to employ appellant to slide or come down said fire escapes and to sign and make such report; that appellant accepted the employment and accompanied Stockton to the building for the purpose of sliding or coming down the fire escapes; that Stockton took him to a room on the third floor supplied with a fire escape consisting of a chain about seven feet in length, one end of which was fastened to the wall of the room at the side of the window and the other to a knotted rope of sufficient length to reach the ground when thrown out-

side through the window, and directed appellant to descend from the window in said room to the ground or sidewalk on the outside of the hotel building by means of said chain and rope; that running along outside of the building and immediately under the window was a cement sidewalk, and the lower part of the window was thirty feet above said sidewalk; that when directed by Stockton to descend from the window by means of the rope and chain, appellant informed him that he was afraid the chain was not sufficiently strong to support him, whereupon Stockton assured him that the chain was sufficiently strong and would support, without danger of breaking, 400 pounds; that appellant then requested of Stockton that the chain and rope be lowered through the window to the ground or sidewalk and two men be sent down to swing upon the rope from the ground or sidewalk and thus test the strength of the chain and rope, whereupon Stockton again assured appellant that the rope and chain were safe and strong and would support a weight much greater than appellant's; that appellant, in obedience to Stockton's direction and believing and relying upon his statements as to the strength and safety of the chain and rope, started to descend said chain and rope from the window to the sidewalk; that when he had climbed out of the window and while holding to the chain, and when at a distance of thirty feet from the sidewalk, the chain, without any fault or negligence on appellant's part, broke, causing him, without any negligence on his part, to fall a distance of thirty feet to the cement sidewalk and seriously and permanently injuring him.

It is charged that the injuries suffered by appellant were caused by the carelessness and negli-

gence of appellees, in that they did not test the rope and chain before directing him to descend, and did not use every device, care and precaution which was practicable and possible for them to use for his protection and safety, limited only by the necessity for preserving the reasonable efficiency of the apparatus or device; that it was practicable and possible for appellees to have tested said chain and rope as requested by appellant, and otherwise, and to have caused a net or similar device to have been suspended under the window above the sidewalk in such a position as to have caught his body in the event the chain and rope broke, thus preventing any injury to him; that during the time mentioned in the complaint, said Jay W. Stockton was acting as the agent or representative of said other appellees in the management and operation of the hotel building and the fire escapes.

The statute, which appellees were endeavoring to comply with at the time of appellant's injury, was passed in 1909 (Acts 1909 p. 302, §§3841-3847b Burns 1914). Section 5 of said act (§3845 Burns 1914), after providing that any owner of a hotel in this state, not already provided with a suitable device for the protection of human life in the case of fire, shall place or cause to be placed in every room of such hotel, except on the ground floor, a rope or other device, or knotted rope and chain, or other better appliance by which occupants of said room can lower themselves with safety from the window, and after making provision as to the size of the rope, and that such device shall be of sufficient strength to support a weight of 400 pounds, has this further provision: "*And that every device for escape from fire constructed under the provisions of this section shall be tested by making a descent from the window or door where*

such device for escape is fastened to the ground by the owner or owners or workmen so constructing them, or by any other man under his or their direction, and a record of such descent and by whom made shall be sent to the chief inspector of the department of inspection."

The section of the law, §3862d Burns 1914, *supra*, relied on by appellant as having been violated by appellees, provides as follows: "It is hereby made the duty of all owners, * * * agents, or persons whatsoever, engaged in the care, operation, management * * * of any building * * * or business of whatsoever kind * * * to see and to require that all metal, wood, rope, chains * * * appliances * * * all contrivances * * * are carefully selected, inspected and tested so as to detect and exclude defects and dangerous conditions, * * * and, generally, it shall be the duty of all owners, managers, operators, contractors, sub-contractors, and all other persons having charge of, or responsible for, any work, mechanism, machinery, appliance, building, factory, plants, means, employment, or business of whatsoever nature, involving risk or danger to employes, or to the public, to use every device, care and precaution which it is practicable and possible to use for the protection and safety of life, limb and health, limited only by the necessity for preserving the reasonable efficiency of such structure, ways, work, plant, building, factory, elevator, cars, engines, machinery, appliances, apparatus, or other devices or materials, without regard to additional cost of suitable materials or safety appliances, or safe conditions, or operations, the first concern being safety to life, limb and health."

It is alleged in the first paragraph of complaint

that appellees came to appellant and informed him that: "The state authorities required that the owners of the hotel in question have some one slide down or come down the fire escapes in said building and that report thereof be made in writing to the said State authorities, and that he desired to employ the plaintiff herein to slide down or come down said fire escapes and sign and make such report." It is further alleged in said paragraph that appellant "accepted said employment and accompanied the said Jay W. Stockton to said building for the purpose of coming down or descending said fire escapes."

In determining whether §3862d, *supra*, was intended to apply in the case now under consideration, it becomes important to ascertain the relation which existed between appellant and appellees, as shown by the material averments of said first paragraph of complaint; that is, whether appellant was a servant of appellees, or a mere contractor, and whether it should be held to apply in view of the relations existing between appellant and appellees. "It is well settled that where one

lets a contract to another to do a particular work, reserving to himself no control over such work except the right to require it to conform to a particular standard when completed, he is not liable for the negligence of the party to whom the contract is let. * * * When the person employing may prescribe what shall be done, but not how it is to be done, or who is to do it, the person so employed is a contractor, and not a servant." *Prest-O-Lite Co. v. Skeel* (1914), 182 Ind. 593, 106 N. E. 365. See, also, *New Albany Forge, etc., Co. v. Cooper* (1892), 131 Ind. 363, 30 N. E. 294; *Indiana Iron Co. v. Cray* (1897), 19 Ind.

App. 565, 48 N. E. 803; *Vincennes Water Supply Co. v. White* (1890), 124 Ind. 376, 24 N. E. 747; *Carlson v. Stocking* (1895), 91 Wis. 432, 434, 65 N. W. 58; *Emmerson v. Fay* (1896), 94 Va. 60, 63, 26 S. E. 386; *Hexamer v. Webb* (1886), 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; authorities cited in note to 76 Am. St. 383, 393, 394; and note to 65 L. R. A. 480. If the relation of master and servant did not exist between appellant and appellees, and appellant was a mere contractor in the performance of the work which he engaged to do, he became a master, and what was said to him by appellees by way of assurance that the appliance was safe, becomes wholly immaterial. In the case at bar, appellees, as shown by the allegations

3. of the complaint, informed appellant that they had equipped the hotel with fire escapes, and that they were required by the law to have some one slide down or come down the fire escapes, and that report thereof be made in writing to the authorities, and that they desired to employ appellant to slide or come down the fire escapes and make such report. Appellant accepted this employment. Appellee thereby prescribed what should be done, but there is nothing in the complaint to show that appellees had any authority to prescribe how it was to be done. Appellant was left to his own methods, without any control whatever by appellees.

We are of the opinion that the complaint shows that appellant, in the performance of the work which he engaged to do, was not a servant. After the contract was entered into, it was wholly immaterial what was said by the parties if the contract was not thereby changed in character. Appellant's expressions of fear and suggestions of certain tests, and appellees' assurances of safety did

not, in any way, change the relations of the parties which then existed. After the contract was entered into, appellant was his own boss, and if he undertook to perform the task which he had contracted to do, without taking precautions to ascertain whether the equipment was safe, then he incurred all the risk incident thereto. We are of opinion that §3862d, *supra*, was not intended to apply to a case like the one under consideration, where the owner of a hotel building expressly contracts with another to do the particular thing which the statute requires such owner to do or have done.

The lower court did not err in sustaining the demurrer to the first paragraph of complaint. Judgment affirmed.

Hottel, P. J., Moran and Felt, JJ., concur; Caldwell, C. J. and Ibach J. concur in the result.

NOTE.—Reported in 113 N. E. 388. See under (2) 26 Cyc 1546, 1547; 76 Am. St. 382, 384; (3) 26 Cyc 1084.

WILLIS, ADMINISTRATOR v. FERGUSON, GUARDIAN.

[No. 9,465. Filed March 10, 1916. Rehearing denied June 28, 1916.]

1. APPEAL.—*Time for Perfecting.—Extension of Time.—Showing Good Cause.—Statute.*—Under §2977 Burns 1914, §2454 R. S. 1881, and §2978 Burns 1914, Acts 1913 p. 65, providing that any person considering himself aggrieved by a decision of the circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, may appeal by filing a bond within thirty days from the rendition of the decision complained of, unless, for good cause shown, the court to which the appeal is prayed shall direct such appeal to be granted, upon the filing of a bond, within 180 days after such decision, an appellant will not be granted additional time beyond the thirty-day period in which to perfect the appeal unless he complies with the statute by showing good cause therefor. p. 565.
2. APPEAL.—*Time of Perfecting.—Administrator.—Statute.*—While an administrator, under §2980 Burns 1914, §2457 R. S. 1881, is not required to file an appeal bond in an appeal from a decision

growing out of any matter connected with a decedent's estate, yet he must comply with the requirements of the statute (§2978 Burns 1914, Acts 1913 p. 65) in so far as the time for perfecting an appeal is concerned, and, in the absence of a showing by appellant for additional time in which to perfect the appeal, it must be dismissed where the transcript is not filed within 120 days after the decision complained of is made. p. 566.

From Marion Probate Court; *Mahlon E. Bash*, Judge.

Action by Frank Ferguson, guardian, against Cassius M. C. Willis, administrator. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

Joseph K. Brown and *John Browder*, for appellant.

R. N. Miller, for appellee.

MORAN, J.—The question for consideration by the court at this time is, Should this appeal be dismissed for failing to perfect the same within the time allowed by statute to appeal from matters growing out of decedent's estates? The appeal was taken by appellant, the administrator of the estate of Joseph S. Beck, deceased, from an adverse holding to the estate on exceptions filed to appellant's final report by appellee as guardian of the minor children of appellant's decedent. A brief history of the facts is necessary to an intelligent understanding of the question presented for consideration. Appellant, as the administrator of the estate of Joseph S. Beck, collected the sum of \$320 from the Metropolitan Life Insurance Company upon a policy of insurance issued on the life of appellant's decedent, and out of which appellant paid funeral expenses of the deceased in the sum of \$92. After the payment of the funeral expenses appellee, as guardian of the minor children of the deceased, filed an intervening petition on the

theory that all the money collected on the policy of insurance belonged to the minor children, and prayed that the same be turned over to him for their use and benefit. Upon issue being joined on the intervening petition and submission had, a finding and judgment was entered in favor of appellee and against appellant as administrator. Thereupon appellant proceeded to take the necessary steps to perfect an appeal from the judgment, and before the same was perfected, with the knowledge and approval of the probate court, a compromise in writing was entered into between appellant and a firm of attorneys supposed to be representing appellee, as guardian. By the terms of the agreement appellant was to be permitted to take credit for \$92 paid on funeral expenses. Thereafter, upon appellant filing his final report, exceptions were filed by appellee, and the court on the hearing of the same found for appellee and against appellant as administrator, treating the amount of insurance collected as that much surplus in appellant's hands, and ordered the same turned over to the guardian. A judgment to this effect was rendered on April 26, 1915, and on May 26, 1915, a motion for a new trial was overruled. On June 24, 1915, an appeal bond was filed and approved, and on November 19, 1915, a transcript of the proceedings reached this court.

The statute (§2977 Burns 1914, §2454 R. S. 1881; §2978 Burns 1914, Acts 1913 p. 65) which appellee insists controls this appeal, provides, among other things, that any person con-

1. sidering himself aggrieved by a decision of the court or judge, in vacation, may prosecute an appeal by filing an appeal bond within thirty days from the date of the decision complained of, unless for good cause shown the court to which

the appeal is prayed shall direct an appeal to be granted on the filing of such bond within 180 days after the decision, the transcript to be filed within ninety days after the filing of the appeal bond. There is no contention on the part of appellant that this is not a matter growing out of and connected with a decedent's estate within the meaning of the statute, and in this there is no room for controversy, as appellant was at the time acting in his official capacity, and in the interest of the estate, and, further the finding and judgment was against him in this capacity. *Bake v. Smiley* (1882), 84 Ind. 212. Therefore, we must look to the statute providing for appeals in matters of this character to ascertain the time within which to perfect the same. No cause has been shown in this court why the appellant should have additional time in which to perfect the appeal, as provided by statute, and in order to invoke the favor of the court in this respect the statute must be complied with by showing good cause therefor. *Campbell v. Horner* (1895), 12 Ind. App. 86, 39 N. E. 768.

The administrator, so far as the time fixed for taking the appeal is concerned, is required to comply with the statute the same as any other

2. litigant, except, however, he is not required to file an appeal bond. §2980 Burns 1914, §2457 R. S. 1881. *Chipman v. Wells* (1904), 34 Ind. App. 1, 72 N. E. 172; *Yearley v. Sharp* (1884), 96 Ind. 469; *Miller v. Carmichael* (1884), 98 Ind. 236; *Simons v. Simons* (1891), 129 Ind. 248, 28 N. E. 702; *Campbell v. Horner*, *supra*. Having concluded that the matter in controversy is connected with a decedent's estate, within the contemplation of §§2977, 2978, *supra*, and that the time for taking the appeal as provided by statute is binding upon the administrator the same

as any other litigant, there remains for consideration the fact as to whether, in the light of the statute, the appeal was perfected within the time prescribed. Any person aggrieved, as disclosed by the statute, may appeal, etc., by filing an appeal bond within thirty days after the decision complained of is made. If no showing is made for additional time, then the bond must be filed within the time prescribed and the transcript must be filed within ninety days from the filing of the bond. Although the administrator need not file an appeal bond (while in this cause he did), yet he would have 120 days to perfect his appeal in this court. *Simons v. Simons*, *supra*. The motion for a new trial having been overruled on May 26, 1915, the transcript should have been filed within 120 days therefrom, or on September 23, 1915. It was not filed until November 19, 1915. The appeal must be dismissed. *Vail v. Page* (1910), 175 Ind. 126, 93 N. E. 705.

The motion to dismiss the appeal is sustained, and cause dismissed.

NOTE.—Reported in 111 N. E. 810.

INDIANA LIFE ENDOWMENT COMPANY v. CARNITHAN.

[No. 8,467. Filed October 15, 1915. Rehearing denied April 21, 1916. Transfer denied June 28, 1916.]

1. APPEAL.—*Harmless Error.*—*Ruling on Pleadings.*—Error, if any, predicated on the action of the trial court in overruling a motion to require plaintiff to elect to go to trial upon either the first and third paragraphs of his complaint, or upon the second paragraph, was rendered harmless by plaintiff's dismissal of the first and second paragraphs of his complaint before the submission of the case to the jury. p. 574.
2. APPEAL.—*Review.*—*Errors Assignable on Appeal.*—*When Waived.*—*Statute.*—Under §§344, 348 Burns 1914, Acts 1911 p. 415, providing that, if the objection that the complaint does not state facts sufficient to constitute a cause of action is not taken

Indiana Life Endowment Co. v. Carnithan—62 Ind. App. 567.

by answer or demurrer, such objection shall be deemed to have been waived, the question of the sufficiency of the complaint to state a cause of action cannot be raised for the first time on appeal. p. 574.

3. APPEAL.—*Review.*—*Verdict.*—*Evidence.*—*Sufficiency.*—In determining, on appeal, the sufficiency of the evidence to support a general verdict for the plaintiff, the court must look to the evidence most favorable to him. p. 576.
4. CONTRACTS.—*Anticipatory Breach.*—*Actions.*—Where a party to a contract containing mutual and interdependent conditions and obligations disables himself from performing, or prevents the other party from performing, or, before the time of performance arrives, repudiates the contract and refuses to be bound thereby, communicating such repudiation to the other party, the latter is not only excused from further performance on his part, but may, at his option, treat the contract as terminated for all purposes of performance and maintain an action at once for all damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance. p. 577.
5. CONTRACTS.—*Anticipatory Breach.*—*Actions.*—Where an action for damages is predicated on a repudiation of a contract, such repudiation must be positive and *absolute* and *unconditional* in order that it may be treated as an anticipatory breach of such contract. p. 578.
6. INSURANCE.—*Anticipatory Breach.*—*Actions.*—*Damages.*—Where an insurer repudiates its contract and denies liability thereunder and refuses to receive premiums, the assured may elect either to consider the policy at an end and recover the equitable and just value thereof, or he may institute proceedings to have the policy adjudged to be in force in which case the question of forfeiture may be determined, or he may tender the premiums and, if acceptance is refused, wait until the policy becomes payable and then test the forfeiture in a proper action on the policy. p. 579.
7. INSURANCE.—*Repudiation of Contract by Insurer.*—*Actions by Assured.*—Where an insurer repudiates its contract, refuses to accept premiums thereon and denies liability, the assured cannot treat his policy as in force and effect and still preserve his right to sue for damages for its breach. p. 579.
8. INSURANCE.—*Anticipatory Breach.*—*Sufficiency of Evidence.*—In an action for damages predicated on an insurer's alleged repudiation of its policy of insurance contracting to pay a death and a total disability benefit, the evidence is insufficient to show the insurer's repudiation of the contract where there is an admission by the assured that the defendant insurance company did not controvert its liability under its policy for permanent disability existing at the time it refused to accept further premiums. p. 580.

Indiana Life Endowment Co. v. Carnithan—62 Ind. App. 567.

9. **INSURANCE.**—*Entire or Severable Contract.*—A mutual life and disability policy of insurance, providing both a death and a total disability benefit, is not a severable contract where one premium is the consideration for both liabilities. p. 581.
10. **ESTOPPEL.**—*Claim under Contract.*—*Election.*—Where, in an action based on a breach of a contract of insurance by the insurer, it appears that the plaintiff, after an alleged repudiation of the policy by the defendant company, elected to still treat the contract as in force for the recovery of benefits thereunder, he thus kept such contract alive for all purposes both for himself and for the insurer and he estopped himself from afterwards predicated a suit thereon for damages for its alleged repudiation. pp. 583, 586.
11. **APPEAL.**—*Verdict.*—*Evidence.*—*Sufficiency.*—Where, in an action for damages predicated on an alleged repudiation of a contract of insurance by the insurer, the evidence shows that the assured, the plaintiff below, elected, at the time of such alleged repudiation, to treat the contract as still in force for the recovery of benefits thereunder, a verdict for the plaintiff is not sustained by sufficient evidence. p. 585

From Vanderburgh Circuit Court; *W. M. Blakey*, Judge.

Action by Charles T. Carnithan against the Indiana Life Endowment Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

William D. Hardy, for appellant.

George K. Denton and *William P. Miedreich*, for appellee.

HOTTEL, J.—On January 19, 1912, appellee filed in the court below his complaint in two paragraphs against appellant and Thomas H. Kirkbride.

The first paragraph, after alleging that appellant was duly organized and incorporated as a mutual life and disability insurance company on the assessment plan, under chapter CXCV of the Acts of 1897 (Acts 1897 p. 318, §§4739-4764 Burns 1908), engaged in the business of insuring the lives of its members and policy holders, and also in insuring

them against disability, proceeds in substance as follows: That on May 19, 1910, appellant executed and delivered to appellee a policy of insurance whereby, in consideration of one dollar and a monthly premium of one dollar, payable on the first day of each calendar month thereafter, it agreed to pay the beneficiary therein named, immediately upon receipt of proofs of the death of appellee, \$100 for funeral and other emergency expenses, and thereafter to pay to said beneficiary \$12 monthly on the last day of each calendar month during his life, beginning on the last day of the calendar month next succeeding the death of appellee, not to exceed the total sum of \$3,000; that by such policy appellant also agreed that, if appellee should by reason of pulmonary tuberculosis become totally and permanently disabled from performing, managing and directing any kind of service or labor or other business upon which he might depend for a livelihood, it would, upon receipt of proofs thereof, pay the monthly benefits of \$12 to appellee during the remainder of his life, not to exceed \$3,000; that appellee performed all the conditions of the contract on his part to be performed prior to February 1, 1911, at which time appellant repudiated said contract and refused to accept any further payment of premiums thereon and notified appellee that it would not do so, unless within three months from such date appellee would furnish it a certificate of his good health, and that, in case of his failure to furnish such certificate within said period, appellant would thereafter treat his contract of insurance as null and void; that appellee could not furnish such certificate because he was then suffering from, and afflicted with, tuberculosis, which fact appellant well knew at the time it refused to accept said premium and required of

appellee that he furnish such certificate; that it was solely because of appellee's said condition of health that appellant repudiated its said contract of insurance and refused to accept further premiums thereunder; that appellee has been damaged by appellant's repudiation of such contract in the sum of \$5,000, etc.

The second paragraph of the complaint differs from the first in that it seeks to recover upon the policy of insurance under the clause thereof hereinafter set out. This paragraph contains the same general averments contained in the first paragraph relative to appellant's organization and incorporation and the issuance of the policy of insurance, and then proceeds in substance as follows: "That after the making of said contract and prior to the 30th day of January, 1911, the plaintiff contracted pulmonary tuberculosis, by reason of which he became and was on said 30th day of January, 1911, and has ever since continued to be, totally and permanently disabled from performing, managing or directing any kind of service or labor or other business upon which he might or did depend for a livelihood. That the plaintiff had performed all the conditions of said policy and contract of insurance on his part to be performed, and that *there is due him by reason of said disability under and by virtue of the terms of said policy the sum of Twelve Dollars (\$12) per month, from and including the month of February, 1911, to the present time, amounting to one hundred and thirty-two dollars (\$132), together with interest on each of said payments at the rate of six per cent per annum, from the time the same became due and payable, and that said defendant has refused and still refuses to pay said sum or any part thereof and had paid no part thereof, and on the 3rd day of October,*

1911, denied all liability therefor, *solely on the ground that plaintiff did not have pulmonary tuberculosis and was not totally and permanently disabled.*" (Our italics.)

On May 6, 1912, appellee filed a third paragraph of complaint, which contained substantially all of the averments of the first paragraph, and, in addition thereto, alleged in detail the facts connected with appellee's failure to pay the premium due February 1, 1911, which averments are in substance as follows: Appellee was ready and willing to pay the premium on said policy due February 1, 1911, when it became due; that when he paid his last preceding premium he stated to Charles A. Hostetter, the secretary and general manager of defendant company, that he was in poor health and might not be able to get to the office when the next premium was due, and asked Mr. Hostetter to stop at his (appellee's) residence and collect said premium; that Mr. Hostetter then promised and agreed with appellee that he would stop at appellee's residence and collect said premium; that on February 1, 1911, when such premium fell due, appellee was not able to go to the office of the company and pay; that he then had the money in his possession and was ready and willing to pay such premium, but did not take it to appellant's office because of his reliance upon said promise of Mr. Hostetter; that Mr. Hostetter did not call for said premium, as he had agreed to do, and a few days later, when appellee was able to get out, he went to appellant's home office at Evansville, Indiana, and tendered to the said Hostetter the premium of \$1, which Hostetter refused to accept, and demanded ten cents more as a penalty; that appellee then produced such additional sum, and said Hostetter then stated to appellee that his

policy had lapsed and his insurance had become forfeited for failure to pay said premium on the day when it was due by the terms of the contract, and stated that no more premiums would be accepted thereon, unless, etc.

A copy of the policy is made an exhibit with each paragraph of complaint. The clause thereof on which the second paragraph of complaint is based provides as follows:

“If said insured shall by reason of * * * pulmonary tuberculosis * * * become totally and permanently disabled from performing, managing or directing any kind of service or labor or other business upon which he might depend for a livelihood, this Company will, upon receipt of satisfactory proof of such total and permanent disability, pay the monthly benefits herein stipulated to the said insured, such payments to begin on the last day of the calendar month next succeeding that in which said claim shall be allowed, and to continue during the life of the insured, the total so paid, however, not to exceed the maximum amount stated in this policy.”

Appellant filed an answer in general denial, and also an affirmative answer to the first and third paragraphs of complaint. The affirmative answer admits the execution and delivery of the policy of insurance sued on, and that such policy was conditioned as stated in such paragraph; but it avers that, after its alleged acts of repudiation, appellee made application for total and permanent disability benefits, offered proof thereof, and caused appellant to expend the sum of——dollars in investigating the facts as to whether appellee was disabled within the meaning of the policy; and until the filing of this suit, and thereafter, appellee demanded and insisted on such policy being in force and effect,

and demanded the payment of disability benefits on the ground that he was disabled, thereby electing not to treat said actions of appellant as a repudiation of such contract, and thereby estopping himself from so treating such acts.

Issues were joined on such answer by reply in general denial. Appellant also filed a motion to require appellee to "elect to go to trial upon either the first and third paragraphs of his complaint, or upon the second paragraph, that is, to proceed upon the theory that the contract of insurance was in full force and effect for all purposes, or upon the theory that the said defendant had repudiated and broken said contract." This motion was overruled, but no exception was reserved to such ruling, and, in any event, was rendered

1. harmless by appellee's dismissal of the first and second paragraphs of his complaint, before the case was finally submitted to the jury. A verdict was returned in favor of appellee for \$1,000. A motion for a new trial filed by appellant was overruled and judgment rendered on the verdict.

Two errors are assigned and relied on for reversal. The first challenges the ruling on appellant's motion for new trial, and the second challenges the sufficiency of the third paragraph of complaint to state a cause of action. This action was commenced

since the amendment of §§344, 348 Burns 1908 by the act of 1911 (Acts 1911 p. 415, §§344, 348 Burns 1914), and hence no question is presented by the second error assigned. *Stiles v. Hasler* (1913), 56 Ind. App. 88, 104 N. E. 878. Appellant has expressly waived all the grounds of its motion for new trial, except Nos. 1, 2, 3, 7, 10 and 11. The first ground challenges the verdict

of the jury as not being sustained by sufficient evidence, and it will be considered first.

The policy of insurance was read in evidence, and contains the following provisions, among others, viz.:

“First.—The person to whom this policy is issued shall pay to the authorized collector of this Company, having the receipts of the Secretary, the stipulated premiums named in the face of this policy, on or before the first day of the calendar month on which the same shall become due * * *. Second.—The first stipulated premium provided in the face of this policy is due and payable upon the delivery of this policy, and this policy will not be in force until said first stipulated premium is paid; but after the payment of the first stipulated premium as above provided, if the premiums have not been paid in advance, as provided above and on the face of this policy, the Company will continue this policy in full force and effect for a period not to exceed three months from the time of the first default in payment, during which time the holder of this policy may pay up all delinquent dues herein by paying ten cents extra for each month in default and furnishing a satisfactory certificate of continued good health to the company. Third.—But if all the premiums, dues, assessments and penalties are not paid in full and a health certificate furnished as above provided within three months from the time of the first default in the payments on this policy, then this policy shall lapse and become null and void and ipso facto forfeited without notice, and all rights of the insured or his or her beneficiaries herein named shall cease; and all payments made hereon shall become forfeited to the Company. * * * Eleventh. If the holder of this policy shall become totally and permanently disabled, and shall thereby receive the benefits as provided herein, at the death of such policy holder, all

right or claims under the terms of this policy, whether of the insured or of the beneficiaries herein named, shall cease and terminate. But if the insured shall continue to pay all premiums, dues and assessments on this policy during said disability, then the rights and interests of the beneficiaries shall be preserved, and after the death of the insured the beneficiaries will receive the monthly benefits as provided herein, not to exceed, however, the maximum amount named in this policy, including the amount drawn by the insured during disability."

It is conceded by appellee that he did not pay when due the premium which, by the terms of his policy just indicated, fell due February 1, 1911, but appellee claims that his failure to so pay was induced by appellant's promise, and that appellant thereby waived the payment so provided. Upon this question appellee's evidence substantially supports the averments of his complaint.

Appellant, while it introduced evidence denying said promise and waiver, recognizes that upon such question this court must look to the evidence most favorable to appellee, and hence that it will

3. be bound by appellee's statements in reference thereto, but insists, in effect: (1)

That appellee's own statement does not show a repudiation or cancellation of the policy of insurance, but, at most, discloses appellant's intention to cancel the policy some time in the future, unless appellee complied with certain conditions, and that there is no averment that such intent was ever, in fact, executed; (2) that after appellant's alleged act of repudiation and breach of its contract had become known to appellee he elected to continue the contract in force by demanding the benefits of the clause thereof above set out, on which he based his

second paragraph of complaint, and thereby estopped himself from claiming damages on account of such repudiation.

The questions, therefore, which we are required to determine are: (1) Is the evidence in the case sufficient to warrant the finding of the jury that appellant repudiated or renounced its contract, so as to constitute an anticipatory breach thereof such as to authorize an action for damages? (2) Assuming that appellant did so renounce its contract, does the evidence show that such renunciation was accepted by appellee, and that appellee thereafter treated the contract as rescinded for all purposes, except that of predicating an action for damages thereon on account of its repudiation?

The law applicable to these questions seems to be well settled. The doctrine that there may be an anticipatory breach of an executory contract resulting from an absolute refusal to perform is now accepted and followed in most jurisdictions; that is to say, where parties enter into a contract embodying mutual and interdependent con-

4. ditions and obligations, and one of the parties thereto disables himself from performing, or prevents the other party from performing, or before the time of performance arrives repudiates the contract and "refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may, at his option, treat the contract as terminated for all purposes of performance, and maintain an action *at once* for damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance * * *." (Our italics.)

O'Neill v. Supreme Council, etc. (1904), 70 N. J.

Indiana Life Endowment Co. v. Carnithan—62 Ind. App. 567.

Law 410, 57 Atl. 463, 1 Ann. Cas. 422, and cases cited; *Indiana Life, etc., Co. v. Reed* (1913), 54 Ind. App. 450, 458, 459, 103 N. E. 77. This doctrine has been long announced and followed in the English courts, the leading case being that of *Hochster v. De Latour* (1853), 2 El. & Bl. 678, 22 L. J. (Q. B.) 455. While some of the state courts, notably Massachusetts (*Daniels v. Newton* [1874], 114 Mass. 530, 19 Am. Rep. 384; *Collins v. Delaporte* [1874], 115 Mass. 159), have refused to follow this doctrine, the great weight of authority in such courts is in its favor (*O'Neill v. Supreme Council, etc., supra*; *Day v. Connecticut, etc., Ins. Co.* [1878], 45 Conn. 480, 495, 29 Am. Rep. 693; *Mutual Reserve, etc., Assn. v. Taylor* [1901], 99 Va. 208, 37 S. E. 854; 3 Elliott, Contracts §§2028, 2029 and cases cited in notes), and it also has the approval of the United States Supreme Court. *Roehm v. Horst* (1899), 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. In each of these cases will be found a comprehensive discussion of the doctrine, together with a collection of numerous cases decided by the courts of different jurisdictions. An examination of these cases will show that the doctrine has been applied by various state courts to insurance contracts similar to that under consideration, and this court in the case of *Indiana Life, etc., Co. v. Reed, supra*, held the doctrine applicable where a contract was involved identical with the one now under consideration. The cases which approve and follow the doctrine, however, all agree that the repudiation of the contract relied on

5. must be positive and *absolute and unconditional* in order that it may be treated as an anticipatory breach of such contract. *Dingley v. Oler* (1896), 117 U. S. 490, 502, 503, 6 Sup. Ct. 850, 29 L. Ed. 984, 988; *Indiana Life, etc., Co. v. Reed,*

Indiana Life Endowment Co. v. Carnithan—62 Ind. App. 567.

supra, and cases cited; *Zuck v. McClure* (1881), 98 Pa. 541; 1 Beach, Contracts §413.

The authorities also emphasize the fact that one party to such a contract may not by himself rescind it, and that a repudiation by him alone, although absolute and sufficient to justify the other party in treating it as an anticipatory breach, does not necessitate such action by the latter party, but the latter party may elect to stand upon his contract and perform, or offer to perform, all the conditions thereof required of him, and then, when the day of performance arrives, proceed to enforce his contract. It seems that

in cases like the one under consideration,

6. where an insurer repudiates its contract and denies liability thereunder, and refuses to receive premiums, the policy holder may pursue either of three courses, viz.: First, he may elect to consider the policy at an end and recover the equitable and just value of the policy. Secondly, he may institute proceedings to have the policy adjudged to be in force in which case the question of forfeiture may be determined. Thirdly, he may tender the premiums and if acceptance is refused wait until the policy by its terms becomes payable and then test the forfeiture in a proper action on the policy. *Day v. Connecticut, etc., Ins. Co., supra*; *Metropolitan Life Ins. Co. v. McCormick* (1897), 19 Ind. App. 49, 56, 49 N. E. 44, 65 Am. St. 392, and cases cited. In such cases, however,

the policy holder may not treat his policy

7. as in force and effect and still preserve his right to sue for damages for its breach.

Upon this subject the Supreme Court of the United States, in the case of *Roehm v. Horst, supra*, p. 13, quotes with approval the following language of Lord Justice Bowen:

“ ‘We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract.’ Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen* (a harmless thunderbolt, a noisy but ineffectual menace;) and holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration *only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such.*” (Our italics.)

Going back to the first question suggested, we inquire whether the evidence shows a repudiation by appellant of the contract of insurance within the meaning of the law as expressed in the cases cited. Appellee’s own evidence and ad-

8. missions in his brief, we think, necessitate a negative answer to this question. Upon this subject appellee, in his brief, in answering appellant’s argument on election of remedies, in attempting to show that there was no inconsistency between his effort to collect under the disability

clause hereinbefore set out for permanent disability resulting from pulmonary tuberculosis contracted before the alleged repudiation, and his final recovery of damages for repudiation of such contract, says: "But there was another phase to this case. *The company admitted the policy was in full force and effect up to the first day of February.* Therefore, if the member became disabled within the terms of the contract prior to that date, *he was entitled to the sum of \$12 per month during the continuance of such disability, and about this there was no controversy with the appellant.*" (Our italics.) It appears, therefore, from appellee's own admission, that appellant never controverted the fact of its liability under its policy for any permanent disability resulting from pulmonary tuberculosis existing at the time of its refusal to accept further premiums. All appellant did, in effect, was to say to appellee that, because of his failure to pay his premium due February 1, 1911, it would receive no more premiums; that for such failure he had forfeited his right to keep his policy alive for the incurrence of future liability, unless, within the time specified in his policy, to wit, three months from February 1, 1911, he furnished appellant a certificate of good health as required by his policy; that in case of his failure to furnish such certificate within the time specified his policy would then be canceled. While the contract of insurance herein involved provided for a liability against

9: appellant resulting from either death or disability, the consideration for both of such liabilities was one and the same premium, and hence such contract was not severable.

The third paragraph of the complaint proceeds upon the theory of a repudiation of the contract in toto, and it was upon such theory that the case

was tried and the judgment below rendered. Appellee's admission just set out shows that there was not such a repudiation. Giving to such admission the interpretation most favorable to appellee's contention, the very most that it can be said to show is that appellant's acts and conduct were such as to have justified appellee in treating them as a repudiation of the contract if he had so elected. By this statement we do not mean to be understood as saying that appellee would, in fact, have been justified in electing to so treat appellant's acts and conduct. Whether, under the law as herein announced, appellee would have been so justified, is not of controlling influence, in view of the other admitted facts in the case, and hence such question need not be and is not decided. This is so because appellee did not so treat said acts and conduct, but, on the contrary, he elected to treat said contract of insurance as still alive and subsisting for the purpose of enforcing the provision thereof which gave to him benefits on account of permanent disability resulting from pulmonary tuberculosis claimed to have been contracted before and existing at the time of such alleged repudiation. Upon this subject appellee in his brief, in connection with his statement above set out, further says: The appellee "contended that he became so disabled in the month of January, and in order to protect his rights under this condition it was necessary for him, as required by the terms of the contract, to make proof of such disability, and this he did. * * * Regardless of whether there was a repudiation of the contract or not, the plaintiff was entitled to recover if disabled prior to the first day of February. The second paragraph of the complaint was based upon this theory. Indeed, as attorneys for appellee

we would have been neglectful of our duty if we had not given the notices required by the contract in order to protect our client on this phase of the controversy. The appellant might have sustained its contention that there was no repudiation of the contract, in which event, the member although entitled to recover for disability beginning prior thereto, might have lost his right by failure to make the proofs required by his contract."

It is therefore admitted that after the alleged repudiation of his contract appellee, instead of treating the contract as rescinded and ended except

for the purposes of a recovery of damages

10. on account of such repudiation, elected to still treat the contract in force for recovery of benefits thereunder; in other words, appellee was trying to hold to two inconsistent remedies, viz.: he was trying to keep the contract alive in order that he might enforce one of its provisions and at the same time treat it as canceled for all purposes except for the purpose of predicated damages for a repudiation thereof. Appellee by thus electing to keep such contract alive for his own benefit kept it alive for all purposes, both for himself and for appellant, and estopped himself from afterwards predicated a suit thereon for the alleged repudiation. Upon this subject the court, in the case of *Day v. Connecticut, etc., Ins. Co., supra*, said: "In *Howland v. Continental Life Ins. Co.*, 121 Mass. 499, the premium fell due on Sunday, and payment was tendered on Monday and refused. A suit was brought eleven months afterwards, with no previous notice to the company that the plaintiff elected to abandon the policy. The court held that the suit could not be maintained, on the ground that the election was not within a reasonable time. "In *McAllister v. The New Eng-*

land Mutual Life Insurance Co., 101 Mass. 558, the insured refused to pay a premium note, and declared that 'he would not have anything more to do with the insurers and abandoned the whole thing'; but he retained the policy and the insurers retained the note, nor did it appear that they consented to the abandonment. It was held that the policy remained in force. These authorities show, and that alone is the purpose for which we cite them, that in order to terminate the policy in such cases the concurrence of both parties is necessary." Again in the case of *Bernstein v. Meech* (1891), 130 N. Y. 354, 358, 29 N. E. 255, 256, the court, in discussing the same question, said: "It is urged that the plaintiff's letter to the defendants must be treated as a refusal to perform and as a breach of the contract on his part, which relieved them from its obligation, and afforded to the defendants a right of action. It is true that when one of the parties to an executory contract has renounced it, the other party to it may act upon the assumption of such a breach before the time for performance arrives. (*Windmuller v. Pope*, 107 N. Y. 674) * * * .

"But whatever view may have been taken of the right of the defendants to treat the contract for the purposes of its performance as at an end and to act upon that assumption when they received the plaintiff's letter, they disposed of that question by their letter to him. By this it appeared that the defendants elected to keep the contract in force for the purposes for which it was made. This operated alike upon the rights of both parties, and the plaintiff was justified in so understanding it. In that view the contract was kept alive until the time arrived for performance, and the obligations of the defendants no less than those of the plaintiff for

Indiana Life Endowment Co. v. Carnithan—62 Ind. App. 567.

that purpose remained effectual. (*Johnstone v. Milling*, L. R. [16 Q. B. D.] 460; *Frost v. Knight*, L. R. [7 Exch.] 111; *Zuck v. McClure*, 98 Penn. St. 541.)”

If the only evidence of appellee’s election to treat his contract as in force was that of the filing of his second paragraph of complaint herein, the later dismissal of such paragraph might have some controlling influence and render the authorities cited by him applicable. Upon this question we need not and do not express any opinion, because appellee, by his acts and conduct herein indicated, at the time of the alleged repudiation and before the bringing of his suit, settled the question of such election and estopped himself from afterwards electing to rescind such contract and to sue for damages thereon.

We are therefore of the opinion that the decision of the trial court is not sustained by sufficient evidence; and hence that such court erred in

11. overruling the motion for a new trial. Before concluding this opinion, we deem it proper to say that, if appellee’s acts and conduct at the time of and after the alleged repudiation had shown that he was merely claiming and insisting on his right to recover as damages the value of the benefits provided by the disability clause of his contract on account of the repudiation of such contract, instead of showing an intention to treat such contract as still in force and an effort to prove his claim under the provisions thereof, an entirely different question would be presented for our determination. What we have said is intended to be limited in its application to the contract in suit and to the facts of this case as presented by the issues and evidence. As to what rule of law would be applicable in a case involving a contract of in-

surance containing two separate, independent, and severable provisions of liability, with a complaint in two paragraphs, one predicated on, and seeking to recover on, one provision of the policy, and the other paragraph predicated on, and seeking to recover because of a repudiation of, the other provision of such policy, we express no opinion, because no such question is presented by the pleadings in this case, and hence need not be and is not decided.

As before stated, the third paragraph of complaint on which the judgment herein is based is an action for damages for repudiation of the contract, and the case proceeded to trial and was in

10. fact tried on such theory; and appellee by his acts and conduct in electing to treat the policy in force and to recover monthly benefits under its provisions, as before indicated, estopped himself from treating the contract as rescinded.

Other questions are presented by this appeal, but, if our view of the case herein indicated be correct, such questions are not of controlling importance and hence need not be decided. The judgment is reversed with instructions to the trial court to sustain appellant's motion for a new trial and for such other proceedings as may be consistent with this opinion.

NOTE.—Reported in 109 N. E. 851. Remedy of beneficiary on repudiation of contract by insurer, 14 L. R. A. (N. S.) 1111, note. See under (6) 29 Cyc 213.

MARTIN v. SHOUB.

[No. 9,051. Filed June 29, 1916.]

1. SALES.—*Warranties.*—*Representations.*—Antecedent representations made by the vendor as an inducement to the buyer, but forming no part of the contract when concluded, are not warranties. p. 590.
2. SALES.—*Warranties.*—*Representations.*—A representation is an



antecedent statement which is made to induce one to enter into a contract, but which is not an element thereof, its purpose being accomplished when the contract is made; whereas a warranty is, by the intention and agreement of the parties, a term of the contract. p. 590.

3. **FRAUD.—*Fraudulent Representations.*—“Warrant.”**—In an action for damages for fraudulent representations inducing the purchase of a spavined stallion, the character and nature of the language used by the vendor in statements as to the soundness of the horse made prior to the sale showed that such statements were misrepresentations and were not intended as warranties; and, although the word “warrant” occurred in some of the statements, it was used in its colloquial sense, meaning to assure or to affirm confidently. p. 591.
4. **FRAUD.—*Fraudulent Representations.*—*Liability.***—Where a vendor of personal property induces one who relies on his statements to purchase personal property by knowingly making false and fraudulent representations as to the quality of the goods sold, such vendor is not relieved from liability for his fraud by the mere fact that the sale is evidenced by a contract expressly omitting warranties. p. 591.
5. **FRAUD.—*Remedies of Buyer.*—*Action for Breach of Warranty.*—*Action for Fraud.***—If misrepresentation, in inducing a sale of personal property, is accompanied by fraudulent intent to deceive, it may support an action for fraud, although an action in tort for breach of warranty would lie. p. 591.
6. **FRAUD.—*Remedies of Buyer.*—*Action for Breach of Warranty.*—*Action for Fraud.***—An action for fraud and an action in tort for breach of warranty, based on the same facts, will not lie at the same time. p. 592.
7. **APPEAL.—*Verdict.*—*Evidence.*—*Sufficiency.***—In an action for damages sustained by reason of a vendor's fraudulent representations whereby a vendee was induced to purchase a spavined stallion, the evidence is sufficient to sustain a verdict for the plaintiff where it shows that the vendor knowingly made false and fraudulent representations that the stallion involved was sound in every way at the time of the sale, whereas it was in fact spavined and worthless for breeding purposes, and that the vendee was induced to make the purchase by reason of such fraudulent representations. p. 592.

From DeKalb Circuit Court; *Frank M. Powers*, Judge.

Action by Peter Shoub against Wells R. Martin. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Fred R. Freeman, C. S. Smith and P. V. Hoffman,
for appellant.

William P. Endicott and Edgar W. Atkinson, for
appellee.

IBACH, J.—This was an action for damages sustained by reason of fraudulent representations of appellant which induced appellee to purchase a stallion from him. A verdict in favor of appellee for \$900 was returned. The errors assigned mostly turn upon the one question whether there was sufficient evidence upon which to predicate a verdict of fraud. This question is presented in various ways, under assignment of error in overruling appellant's motion for new trial, among the grounds of which were the overruling of a motion to direct a verdict for defendant, the giving of certain instructions based on the theory that there was evidence to show fraud, the refusal to give other instructions on the theory that the evidence was insufficient for that purpose, and the insufficiency of the evidence to support the verdict. Error is also assigned in the court's overruling appellant's motion for judgment on the answers to interrogatories returned by the jury.

It appears from the evidence that appellant came to appellee and proposed to sell to him the stallion in question; that appellee was at first not disposed to buy the horse, but later agreed to trade some machinery for him. The parties had two conversations prior to the consummation of the sale. Appellant said that the horse was sound and all right; that he had to be so; that appellant could not sell high priced horses unless they were all right; that he had to be honest to sell them; that he warranted the horse to be sound and all right; that if he sold the horse to appellee, he would have to be honest

and straight with him. Appellee stated that he relied on these statements, and had expected to get a warranty with the horse. The sale was consummated by the following written contract, which was dictated by appellant in appellee's presence, and was signed by both parties:

"This article witnesseth that, whereas, I, Mr. W. R. Martin, have this day sold to one Mr. Peter Schoub, one certain stallion known as Brisko, Percheron, No. 40201, and said horse is to be transferred to Mr. Schoub with a good title, free and clear from all incumbrances, and I have taken in exchange for the same one certain Avery separator, and one Birdsell No. 6 clover huller, and one Rumely Traction engine, belts and all other attachments complete, ready for thresher, also one twelve horse power gasoline mule engine, nearly new, purchased one year ago, and buzz saw and all attachments complete: Mr. Schoub agrees to deliver the buzz saw, etc. * * *

"This is the only contract made by us and is not to be changed or varied by any promises or representations by ourselves or other people."

After the sale, it was found that the stallion had bone spavin, and was on that account worthless for breeding purposes. There was evidence to show that he was spavined at the time of the sale. The evidence was also such that the jury might infer either that appellant knew of the spavin at the time of the sale, or was chargeable with knowledge in the exercise of reasonable care. *Wheatcraft v. Myers* (1914), 57 Ind. App. 371, 377, 107 N. E. 81. Appellee at the time he saw the horse before the sale noticed that he was lame, but he also noticed a slight sore on his foot, and appellant told him that the horse hurt his foot in the car, and this occasioned the lameness. There is testimony that the men holding the horse kept moving him about

so that appellee could not see the leg which was spavined. It was shown that a veterinary found indications of spavin before the sale, and told the men handling the horse not to show him on the pavement, but to keep him on soft ground. The value of the horse if sound was shown to be at least \$1,100 or \$1,200; with the spavin (in view of the statute of this State which prevents the advertising of such a horse as a stallion without giving notice of such defect, §3299n et seq. Burns 1914, Acts 1913 p. 48, and which renders a spavined stallion worthless for breeding purposes) the horse was worth no more than \$150.

Appellant contends very earnestly that the evidence as to any statements made by him shows warranties, not representations; that these warranties were merged in the written contract, and therefore could not be sued on as warranties, and, because intended as warranties, could not constitute fraudulent representations. We do not agree with these contentions. "Antecedent representations made by

the vendor as an inducement to the buyer,

1. but forming no part of the contract when concluded, are not warranties." Benjamin, Sales §610; *Hopkins v. Tanqueray* (1854), 15 C. B. 130, 80 Eng. C. L. 129. "Representation is an

2. antecedent statement which is made to induce the entering into the contract, but which is not a term in or element of that contract. Its purpose is accomplished when the contract is made. Warranty, on the other hand, is by the intention and agreement of the parties, a term in, a part of, or an incident to, that contract, and cannot exist without it." Mechem, Sales §1224. In this state it seems that intention is necessary to a warranty. *Jones v. Quick* (1867), 28 Ind. 125; *Smith v. Borden* (1902), 160 Ind. 223, 66 N. E.

681; *Bowman v. Clemmer* (1875), 50 Ind. 10; *House v. Fort* (1837), 4 Blackf. 293.

In the present case the evidence is such that it may be said that the language used by appellant was not intended as a warranty in the strict legal sense of the word. Appellant made state-

3. ments as to the soundness of the horse in which he did not use the word "warrant."

In some statements he used the word "warrant"; but one meaning of that word is "to assure, to affirm confidently," and it is often used colloquially in this sense. That there was no intention to warrant the horse may be inferred from the written contract which expressly omitted warranties. What appellant said as to the condition of the horse was such as to induce appellee to believe that he was sound and all right, and therefore to purchase him. If appellant made statements as to the horse's

4. condition which he knew or should have known were false, and thus induced appellee to purchase him, relying on such statements, the effect of such fraud can not be overcome merely by a contract expressly omitting warranties. Because the fraud was so successful as to induce the buyer to take a contract without a warranty is all the more reason that there should be liability on the fraud. *Case Threshing Machine Co. v. Feezer* (1910), 152 N. C. 516, 67 S. E. 1004; *Robinson & Co. v. Ligon* (1909), 146 Mo. App. 634, 124 S. W. 590.

Even if the language used was sufficient to constitute a warranty, it is well settled that if misrepresentation is accompanied by fraudulent intent to deceive, it may support a tort action for

5. fraud, although an action in tort for breach of warranty would lie. The restriction is

Staples-Hildebrand Co. v. Metal Concrete, etc., Co.—62 Ind. App. 592.

that both actions will not lie at the same time, and there is necessarily quite a difference in the

6. proof required to make out a case of fraudulent representations from that required to make out a case of breach of warranty. Tiedeman, Sales §180; 1 Parsons, Contracts *580; Page, Contracts §61; Schouler, Personal Property §606; *Hughes v. Funston* (1867), 23 Iowa 257; *Rose v. Hurley* (1872), 39 Ind. 77.

The evidence was sufficient to sustain the verdict; there was no error in the giving and the refusing of instructions; and we do not find the answers

7. to the interrogatories in irreconcilable conflict with the general verdict.

Judgment affirmed.

NOTE.—Reported in 113 N. E. 384. What amounts to a breach of warranty as to soundness of horse, 32 L. R. A. (N. S.) 182; 102 Am. St. 622. See under (5) 20 Cyc 87, 89.

**STAPLES-HILDEBRAND CO. v. METAL CONCRETE
CHIMNEY CO. ET AL.**

[No. 9,046. Filed May 22, 1916. Rehearing denied June 29, 1916.]

MUNICIPAL CORPORATIONS.—Contractor's Bond to City.—Liability of Guarantor to Materialmen.—Where a contract and bond for city work merely stipulated that the contractor was to "furnish and deliver all the material," the guarantor on the bond is not liable to a materialman for material furnished in the absence of either a provision binding the contractor to pay a materialman for labor or material, or such language used that without paying for such material the contract could not be complied with.

From St. Joseph Superior Court; *Vernon W. Van Fleet*, Judge.

Action by Staples-Hildebrand Company against the Metal Concrete Chimney Company and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Staples-Hildebrand Co. v. Metal Concrete, etc., Co.—62 Ind. App. 592.

Samuel Pettengill, Charles Weidler and Orie Parker,
for appellant.

G. A. Farabaugh and Charles A. Hagerty, for
appellees.

IBACH, J.—This was an action by appellant against appellees on a bond given by appellee Metal Concrete Chimney Company, as principal, and appellee United States Fidelity and Guaranty Company, as surety, to the city of South Bend to secure the faithful performance and discharge of a contract whereby the former appellee was to construct a concrete suction well for said city. The only error assigned is the sustaining of appellees' demurrer to appellant's complaint. It appears from the complaint that appellant furnished materials used in the construction of the well for which it has not been paid, and that the appellee contractor is insolvent. The only question is whether the appellee guaranty company is liable to appellant on the bond for the price of the materials furnished for and used in the construction of the well.

By the terms of the contract with the city, appellee contractor "covenants and agrees to furnish and deliver all the material and to do and perform all the work and labor required to be furnished, done and performed in the construction, erecting and testing of Brick Concrete Suction Well"; and that it "shall indemnify and save harmless the city from all claims for labor performed and materials furnished, and shall furnish satisfactory evidence when called for, that all persons that have done work or furnished material for which the city may be liable, have been fully paid." The city is given the option, in case of abandonment or discontinuance of the work, to apply to the pay-

ment of labor any money due to the contractor for work done prior to the abandonment, and also has the right to retain from money due the contractor sufficient money to pay for any labor or material furnished in the construction of the work, provided satisfactory evidence is not furnished that all such labor and material have been paid for. The city agrees to pay the contractor the prices set forth in the bid for the contract, "as proper compensation for furnishing all material, tools, appliances, plans, labor, etc., required to construct and fully complete aforesaid work."

The bond is conditioned, "whereas, the said Metal Concrete Chimney Company * * * entered into the foregoing contract with the City of South Bend * * * for furnishing all labor and material for the construction of a brick concrete suction well. Now, therefore, if the said Metal Concrete Chimney Company shall well, properly, faithfully and honestly discharge, do and perform all and singular the obligations and things in said contract to be done and performed by the said contractor according to said contract, then said obligation shall be void."

The contract and bond must be construed together. Appellees, by their demurrer to the complaint and the specifications of the memorandum attached thereto, present the contention that there was no agreement to furnish and pay for materials and labor upon the part of the contractor so as to make the contract inure to the benefit of laborers and material men, and that the bond is for the benefit solely of the obligee, the City of South Bend, and not for the benefit of any third person or materialman.

In order to hold a surety or guarantor liable to a materialman on a bond of this character, there

must either be a provision in the contract binding the contractor to pay for labor and material, or such language used that without paying for such material the contract could not be complied with. The provision in the contract and bond that the contractor is to "furnish and deliver all the material" is not such a promise to pay for such material that the guarantor on the bond is liable to a materialman who has furnished materials to the contractor, nor is such a promise deducible from the language of the entire contract. *Greenfield Lumber, etc., Co. v. Parker* (1902), 159 Ind. 571, 65 N. E. 747; *Knight & Jillson Co. v. Castle* (1908), 172 Ind. 97, 87 N. E. 976, 27 L. R. A. (N. S.) 573; *Townsend v. Cleveland Fire Proofing Co.* (1897), 18 Ind. App. 568, 47 N. E. 707; *Snider v. Greer-Wilkinson Lumber Co.* (1912), 51 Ind. App. 348, 96 N. E. 960. Judgment affirmed.

NOTE.—Reported in 112 N. E. 832. See 28 Cyc 1041.

GILBERT ET AL. v. BOLDS ET AL.

[No. 9,062. Filed June 29, 1916.]

1. MINES AND MINERALS.—*Gas and Oil Leases.—Rental Stipulation.—Validity.*—While the lessees of oil and gas lands may be held liable in damages, or the leases forfeited or annulled according to their provisions, for failure to develop the lands in accordance with a fair and reasonable interpretation of the contract, yet this does not make invalid a stipulation by the contracting parties for the payment of a fixed sum as a minimum rental for the leased premises. p. 600.
2. MINES AND MINERALS.—*Gas and Oil Leases.—Development.—Sufficiency.—Determination.*—Where a lease of oil and gas lands does not fix the number of wells to be drilled to constitute a development of the territory as contemplated by the contract, the lessee has the right to determine the number of wells or the extent of the development, and his decision is conclusive so long as he acts honestly and in good faith upon sound business principles. p. 600.
3. MINES AND MINERALS.—*Gas and Oil Leases.—Rental.—Complaint.—Sufficiency.*—In an action to collect a minimum rental

alleged to be due under a lease of oil and gas lands, a complaint, putting in issue the conditions under which the parties to the contract contemplated the payment of such rental by alleging the lease to mean that after the defendants had completed the development of the leased premises by drilling a sufficient number of wells, as determined by them, the minimum rental was to be paid, is good as against demurrer, even though it should be held that the general rule that the amount of development of oil lands is to be determined by the lessee does not apply to a lease involved in the action. p. 601.

From Steuben Circuit Court; *Publius V. Hoffman*, Special Judge.

Action by Adda Bolds and others against George W. Gilbert and others. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

Carlin & Brown, Abram Simmons and Charles G. Dailey, for appellants.

Bratton & Heckenlively and Jay A. Hindman, for appellees.

FELT, J.—This is a suit by appellees against appellants to recover money alleged to be due under the provisions of an oil and gas lease. The case was tried by the court on an amended complaint and an answer in three paragraphs, the first of which was a general denial. There was a reply in general denial to the second and third paragraphs of answer. The court found for appellees in the sum of \$736, and rendered judgment accordingly.

The errors assigned and relied on for reversal are the overruling of the demurrer of George A. Gilbert and Edwin Ball to the amended complaint, and the overruling of their motion for a new trial.

The complaint, so far as material here, is in substance as follows: That appellees were the owners of a quarter section of real estate in Jay county, Indiana, and prior to November 4, 1903, had executed an oil and gas lease on thirty acres of

such tract, which lease was duly acquired by and assigned to appellants; that in pursuance of said lease there had been constructed on said thirty acres three wells for the production of oil and gas and "a certain power to be used in the operation of said wells"; that appellants acquired other leases on adjoining lands, and on November 4, 1903, obtained from appellees an oil and gas lease on the remaining 130 acres of said quarter section, which, in substance, provided that the lessees were granted "all the oil and gas in and under" the real estate, "with the right to enter thereon at all times for the purpose of operating or drilling for oil or gas," and it further provided: That appellees should have the one-eighth part of all oil produced; that the lease was "for and during the term of five years * * * and as much longer as oil or gas is found or produced therefrom or the rental paid according to the terms of the lease. * * * In case no well is completed within ninety days from this day, then this grant shall become null and void unless second parties shall pay to the first party a rental of \$20.00 a month, in advance, for each month thereafter such completion is delayed, for the term of years above mentioned. * * * After first well is completed the second party agrees to complete a well every six months on the above described premises until the farm is drilled up, and in case no wells are drilled after the first one above mentioned, then second parties shall pay a rental as above mentioned, or surrender all the undrilled territory, reserving, however, ten acres to each well producing on said premises. If the locations on the above described lands are all drilled, and the royalty at one-eighth does not net the first party \$25.00 per month, they agree to pay the difference so first party realizes \$25.00 per month

for the wells and power upon said premises which is used to pump wells on adjoining farms, second parties to have the privilege, free of cost, to erect pumper's house on said lease." That by said lease appellants were to complete a well on the premises within ninety days from its date and complete a well thereon each six months thereafter "until said farm was drilled up"—that is, until a sufficient number of wells shall have been completed to properly develop said premises; that appellants entered upon the leased premises and drilled thereon four wells, which have been and are now producing wells; that by the terms of said lease it was provided that if the locations on the land were all drilled and the royalty at one-eighth did not net appellees \$25 per month, appellants should pay the difference so that appellees would realize "\$25.00 per month for the wells and the power upon said premises, which is used to pump on adjoining farms"; that the power so referred to was the power then located on the thirty acres previously leased as aforesaid; that it was thereby intended by the parties to the lease that after appellants had completed the development of the leased premises, if the one-eighth royalty therefrom should not yield to appellees \$25 per month, appellants should pay the deficiency necessary to make their returns amount to \$25 per month for the use of said wells and said power in pumping wells on adjoining farms; that appellants completed their development of the leased premises in 1906, and have produced oil continuously since that time from said premises and have used said power in pumping wells on adjoining farms and are still producing oil and using said power; that since January 1, 1907, the royalties received by appellees

from the production of oil and gas from said premises have not amounted to \$25 per month, and appellees have only received therefrom \$5 per month; that there is due appellees the sum of \$20 per month for each month since January 1, 1907.

The second paragraph of answer sets out the facts in detail to show the production of oil from said 130 acres, and that appellees have received their full one-eighth part thereof; that appellants have not constructed or used any power on said 130 acres for use on other lands.

The third paragraph alleges that appellees do not own the leased premises as tenants by entireties, but that the same is owned by Adda Bolds.

By the memorandum accompanying the demurrer appellants say the complaint is insufficient to state a cause of action, because it does not show any breach of the provisions of the lease; that it does not show that all locations of wells on the leased premises have been drilled; that appellants are not shown to be liable to pay a sum sufficient to make the returns to appellees amount to \$25 per month; that the averments show that appellants are not liable to appellees in any sum whatever.

The effect of appellants' contention is that appellees have no cause of action on the theory of the complaint for the reason that it is not averred that all the locations for wells on the premises were drilled out; that oil and gas leases contain covenants to fully develop the leased premises, and if not specifically set forth, such covenants are implied; that, if appellees have any right of action, it is for damages for the breach of such covenants, or for annulment of the lease as to all the real estate except ten acres with each well.

It is true that development of the leased premises

is a controlling consideration in oil and gas leases, and that lessees may be held liable in dam-

1. ages, or the leases forfeited or annulled according to their provisions, for failure to develop in accordance with the fair and reasonable interpretation of the contract, but this does not prevent the contracting parties from stipulating for the payment of a fixed sum as a minimum rental as was done in this instance. The contract provides that after the first well is completed a well shall be completed every six months "until the farm is drilled up. * * * If the locations * * * are all drilled, and the royalty at one-eighth does not net the first party \$25.00 per month, they agree to pay the difference so first party realizes \$25.00 per month for the wells and power upon said premises." The complaint alleges that appellants completed the development of the leased premises in 1906; that the royalties only amounted to \$5 per month, and there is due appellees \$20 per month from January 1, 1907. The lease does not fix the number of wells to be drilled to amount to the development of the territory as contemplated.

Where such is the case, the lessee has the

2. right to determine the number of wells or the extent of the development, and his decision is conclusive so long as he acts honestly and in good faith upon sound business principles. *Manhattan Oil Co. v. Carrell* (1904), 164 Ind. 526, 73 N. E. 1084, and cases cited; *Young v. Forest Oil Co.* (1899), 194 Pa. 243, 45 Atl. 121; *Colgan v. Forest Oil Co.* (1899), 194 Pa. St. 234, 45 Atl. 119, 75 Am. St. 695; *Ohio Oil Co. v. Detamore* (1905), 165 Ind. 243, 73 N. E. 906. However, in the case at bar, the lease provides that, "if the locations on the above described lands are all drilled," the

lessees shall pay a sum sufficient to make the net returns to lessors amount to \$25 per month.

Appellants contend that the conditions under which the above provisions are applicable are not shown to have arisen in this case; that under the lease the parties contemplated thirteen locations, or one for each ten acres, and only four have been drilled out. Appellees contend that the rule of law above announced controls and that, when it is shown that appellants drilled four wells and then ceased to put down additional wells as provided for in the lease, and continued to occupy the premises and operate the four wells, they thereby determined the extent of the development they desired to make, and appellees had the right to accept their decision, and, in the absence of fraud or bad faith, were compelled to do so, and were thereafter entitled to a return of \$25 per month under the provisions of the lease.

The allegations of the complaint put the meaning of the lease in this respect in issue by the averment that it was thereby intended by the parties to the lease that, after appellants had completed the development of the leased premises by drilling a sufficient number of wells (to be determined by them) the \$25 per month should be paid appellees. Such averments indicate that the lease is ambiguous and that its provisions leave room for a difference of opinion as to when and under what conditions appellees are entitled to collect \$25 per month. By these allegations development to the extent determined by appellants is made the equivalent of drilling out the locations contemplated by the parties to the lease, and the complaint is

3. thereby made sufficient to repel the demurrer, even though it should be held that the general rule contended for by appellees does not apply

under the peculiar wording of this lease. The complaint is therefore sufficient, and the court did not err in overruling the demurrer thereto.

The causes for a new trial not waived by appellants are: (1) The decision of the court is not sustained by sufficient evidence; and (2) it is contrary to law.

The contention as to the evidence is identical with the views of appellants as to the sufficiency of the complaint. If we are correct in our statement of the law already announced, the evidence is sufficient to sustain the decision, for by the provisions of the lease appellants obligated themselves to pay to appellees the amount found due under the conditions established by the evidence. The decision is therefore sustained by sufficient evidence, and the judgment is not contrary to law. Judgment affirmed.

NOTE.—Reported in 113 N. E. 379. Effect of provisions for minimum royalties or annual rent upon right to forfeit mining lease for failure to prosecute work, notes 30 L. R. A. (N. S.) 176; 43 L. R. A. (N. S.) 487. See under (3) 27 Cyc 712.

SHULL v. DUNTEN.

[No. 9,449. Filed June 29, 1916.]

1. APPEAL.—*Review.—Motion for New Trial.—Transcript of Evidence.—Necessity.*—Where consideration of the causes assigned for a new trial, that are properly assignable under the statute, require an examination of the evidence and the evidence is not in the record, no question is presented for review, on appeal, by an assignment of error challenging the action of the trial court in overruling the motion for a new trial. p. 604.
2. APPEAL.—*Review.—Motion for New Trial.—Time for Filing.—Statute.*—No question is presented for review by an assignment of error challenging the action of the trial court in overruling a motion for a new trial where the record shows that such motion was not filed within thirty days from the rendition of the verdict as required by §587 Burns 1914, Acts 1913 p. 848. p. 604.

Shull v. Dunten—62 Ind. App. 602.

3. *APPEAL.—Review.—Assignment of Error.—Judgment.*—An assignment of error that the trial court erred in rendering judgment for or against a party presents no question for review. p. 605.
4. *APPEAL.—Review.—Exception to Judgment.*—An exception to a judgment presents no question for review by the appellate tribunal, since, under the proper practice, the exception should be taken to the ruling of the court upon which the judgment is determined. p. 606.
5. *APPEAL.—Review.—Judgment.—Entry.—Exception.*—Where the record, on appeal, shows an objection and an exception noted at the conclusion of the trial court's entry of the judgment, and such entry is preceded by the court's ruling on the motion for judgment on the interrogatories, the exception so noted is to the judgment and does not apply to the ruling on the motion. p. 607.

From DeKalb Circuit Court; *Dan M. Link*, Judge.

Action by Allen G. Dunten against Susannah Shull. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

C. S. Smith and E. W. Atkinson, for appellant.

P. V. Hoffman, for appellee.

McNUTT, J.—Appellee has filed a motion to dismiss the appeal herein for the following reasons: “(1) Because the record shows that no appeal was prayed from the final judgment in said cause; (2) Because the assignment of errors presents no question for review in this court, as shown by the record; (3) Because there is such a noncompliance with Rule 22 of this court in the preparation of appellant's brief that no question is presented to this court that can be considered under such rule.”

The cause was tried by a jury, which returned a general verdict for appellant, and also answered certain interrogatories submitted July 3, 1915. On July 6, 1915, appellee filed a motion for judgment on the answers to interrogatories, and, on

July 31, 1915, this motion was sustained, and at the same time judgment was rendered for appellee, to which appellant objected and excepted. On August 28, 1915, appellant filed her motion for a new trial, and on August 30, 1915, appellee filed his motion to strike out the motion for a new trial which was overruled, and at the same time appellant's motion for a new trial was overruled and appellant excepted. At the same time appellant prayed an appeal to the Appellate Court, which was granted upon filing an appeal bond for \$250, with sureties to the approval of the court within five days. On September 4, 1915, appellant presented her appeal bond in said sum, with surety which was approved by the court. The above was all done at the same term of court.

Appellant's first assignment of error challenges the action of the court in overruling her motion for a new trial. Every reason which appellant

1. assigns for a new trial, that is assignable under the statute, requires an examination of the evidence, and this not being in the record no question is presented by the first assignment of error.

Appellee contends in his brief, on motion to dismiss, that nothing is presented by the first assignment of error for the reason that the motion for a new trial was not filed in time, being more than thirty days after the rendition of the verdict.

This contention is supported by authority,

2. and appellant's first assignment presents no question for this additional reason. *Blose v. Myers* (1914), 58 Ind. App. 34, 107 N. E. 548; §587 Burns 1914, Acts 1913 p. 848.

Appellant's second assignment of error is as follows: "The DeKalb Circuit Court erred in rendering judgment for the plaintiff and against

the defendant on the interrogatories and answers thereto, submitted to and answered by the jury." It has been frequently held by the Supreme Court and this court that an assignment that the court erred in rendering judgment for or against a party presents no question for review.

3. Such an assignment was made in the case of *Eckart v. Marion, etc., Co.* (1915), 59 Ind. App. 217, 109 N. E. 224, in which case judgment was rendered on the answers to the interrogatories. On the subject of the sufficiency of said assignment, Judge Caldwell uses this language: "The action of the court which appellant evidently intends to challenge by such assignment is the ruling sustaining such motion. The motion being sustained, judgment followed as a matter of course, and without any additional ruling. The assignment should have been based, however, on the ruling, rather than on the rendering of the judgment. * * * As indicated, in the mere act of rendering judgment, the court ordinarily is not required to rule. That judgment should be rendered for the one party or the other is determined from some prior ruling of the court, and generally from a succession of rulings. That the judgment was properly or improperly rendered may depend on the correctness of a number of such prior rulings. It follows that ordinarily it cannot be ascertained from a general assignment challenging the judgment what particular ruling the appellant desires to challenge. Such an assignment is therefore not sufficiently specific to satisfy the statute. §696 Burns 1914, §655 R. S. 1881. An assignment of error to be sufficient should specify with reasonable certainty the ruling to be reviewed (citing authorities). While the assignment here is irregular in form, and

not to be commended as a model, taken as a whole we think it refers to a single action of the court, and that there can be no doubt respecting the identity of the ruling intended to be presented for review. We, therefore, hold it to be sufficient."

It is insisted, however, by appellee, in his motion to dismiss, that the record shows that there was no exception to the ruling of the court in sustaining appellee's motion for judgment on the answers to the interrogatories. The record is as follows: "Come now the parties herein and the motion for judgment non obstante verdicto is now by the court sustained. It is therefore considered, adjudged and decreed by the court that the plaintiff Allen Dunten recover of and from the defendant, Susannah Shull the sum of \$107.35 without relief from valuation and appraisement laws, together with the costs of this action made and taxed at _____ dollars, to which the defendant objects. and excepts." It will be observed that there is no exception immediately following the action of the court in sustaining the motion for judgment on the answers to interrogatories, but at the close of the judgment which the court renders there is an exception. It is not necessary to cite authority

4. that an exception to a judgment presents no question.

In the case of *Hill v. Chicago, etc., R. Co.* (1916), 61 Ind. App. 331, 111 N. E. 951, the record was as follows: "'And this cause is now submitted to the court upon said demurrer and the court after hearing the argument and being duly advised in the premises now sustains said demurrer to the plaintiff's amended complaint, and the plaintiff failing and refusing to plead further the court now renders judgment on the demurrer. It is, therefore, considered and adjudged by the court that said

demurrer be sustained and the plaintiff take nothing by this action, and that the defendant recover of the plaintiff its costs and charges in this behalf laid out and expended. To which the plaintiff excepts, and prays an appeal to the Appellate Court of this State.' ” In that case Judge Hottel, speaking for the court, says: “It will be observed that no exception was saved to the ruling on the demurrer and hence no question is presented by the first error assigned. The entry shows two separate independent rulings, or actions of the court, viz., the ruling on the demurrer and the rendering of the judgment. The exception follows the judgment and there is nothing in the entry to show that the exception was taken to the ruling on the demurrer, rather than to the action of the court in rendering judgment on the demurrer after appellant had refused to plead further. Indeed, so far as the entry shows, the exception was to the action of the court in rendering judgment. An exception must be certain and a party will not be permitted to except to one ruling and make his exception apply to another.” *State, ex rel. v. Weaver* (1890), 123 Ind. 512, 24 N. E. 330; §656 Burns 1914, §626 R. S. 1881; *Fox v. Town of Monticello* (1882), 83 Ind. 483.

We hold under the above authorities that the record in the case at bar fails to show that appellant took any exception to the ruling of the court

5. sustaining appellee's motion for judgment, and even though the assignment had been in proper form, it would have presented no question. Appeal dismissed.

NOTE.—Reported in 113 N. E. 381.

DEEP VEIN COAL CO. ET AL. v. RAINEY, ADMINISTRATOR.

[No. 8,918. Filed April 19, 1916. Rehearing denied June 29, 1916.]

1. **MASTER AND SERVANT.—Duty of Mine Operator.—Statute.—Operator.—Who is.**—Where the owner leases a coal mine to another, he is not liable for an injury to lessee's employe alleged to be due to a violation of the statutes (§8569 et seq. Burns 1914, Acts 1905 p. 65, as amended by Acts 1911, p. 626) touching upon the duties of coal mine operators and defining who shall be regarded as such, where it affirmatively appears from the complaint, predicated the lessor's liability on the theory that he is embraced within the meaning of the term operator, that the lessee operates the mine on his own account, since only those who come within the statute (§8569 Burns 1914, *supra*) as operators are persons or companies actively and directly engaged in operating a mine or persons on whose account a mine is operated. p. 616.
2. **MASTER AND SERVANT.—Safe Place to Work.—Delegation of Duty.**—The duty resting upon the master, whether obligated by statute or the common law, to provide a safe working place for his servants cannot be delegated to another and the master thereby escape responsibility for results. p. 617.
3. **MASTER AND SERVANT.—Safe Place to Work.—Duty of Mine Owner.—Statute.**—The various duties of mine operators, as specified by the statutes (§8569 et seq. Burns 1914, Acts 1905, as amended by Acts 1911 p. 626) looking to the safety of employes, rest upon the actual operator and not the owner, where the latter leases his mine and retains no control over it or where it is not operated on his account. p. 617.
4. **MASTER AND SERVANT.—Injuries to Employe.—Pleading.**—In an action for injury to a coal mine employe directed against the owner of the mine and the lessee thereof, a complaint based on the theory that the lessee was working the mine is insufficient, in the absence of proper averments, to present the issue that the owner was in fact the operator and that the lease was merely a subterfuge to relieve the owner from liability for the negligent and unlawful operation of the mine by the lessee. p. 618.
5. **MASTER AND SERVANT.—Injuries to Third Persons.—Liability.—Independent Contractor.—Dangerous Industry.—Statute.**—As a general rule the employer is not answerable for the acts of an independent contractor, but, where the work to be done is inherently dangerous, although care be used, or where the necessary consequence of the work is injury to another, such rule has no application; and, while the statute (§8624a Burns 1914, Acts 1911 p. 658) declares coal mining to be a dangerous industry, yet the law recognizes that it may be prosecuted with reasonable safety if care be used. p. 619.

Deep Vein Coal Co. v. Rainey—62 Ind. App. 608.

6. MASTER AND SERVANT.—*Operation of Mine.—Personal Injuries.—Liability of Lessor.*—In an action for injury to a coal mine employe directed against the owner of the mine and his lessee, the complaint fails to charge the owner with liability where it appears from the averments that the owner surrendered, under the terms of a lease, possession of the mine and complete control of its operation to the lessee, and that the defective condition alleged to have caused the injury complained of originated, because of the lessee's negligence, subsequent to the time the mine was placed in his control. p. 620.
7. MASTER AND SERVANT.—*Safe Place to Work.—Inspection of Roof of Mine Room.—Statute.*—The duty imposed by the statute (§8580 Burns 1914, Acts 1905 p. 72) on a mine operator of making a reasonable inspection of the working places in a mine at least every alternate day is not discharged by a mere visual inspection of the roof of a mine room where such an inspection is insufficient and ineffective because of the nature of the material forming such roof, and the operator is chargeable with whatever knowledge of conditions a reasonable inspection would disclose. p. 624.
8. MASTER AND SERVANT.—*Safe Place to Work.—Duty of Mine Operator.—Statute.*—Under §8580 Burns 1914, Acts 1905 p. 72, an operator of a mine is charged with the duty of keeping a sufficient quantity of timbers on hand with which to make secure the loose rock and coal discovered in the roof of a mine room or else he must remove the same. p. 625.
9. MASTER AND SERVANT.—*Injuries to Servant.—Negligence.—Verdict.—Evidence.—Sufficiency of.*—In an action for the injury and death of a coal mine employe where there was evidence that the decedent at the time of his injury was engaged in a proper exercise of his employment, when a section of rock fell upon him from a mine room roof that had been weakened by the removal of braces and props used to give it support; that a reasonable and proper inspection would have disclosed the dangerous condition which could have been remedied by the use of supports or by the removal of the loosened rock; that when workmen notified the mine boss of the dangerous condition of the roof he failed either to support it, although it was practicable to have done so, because of a lack of proper timbers, or to remove the coal and rock that had become loosened, such evidence is sufficient to support a general verdict for the plaintiff against the lessee who had entire control and direction of the operation of the mine. p. 625.
10. TRIAL.—*Instructions.—Repetition.*—It is proper for the trial court to refuse to give tendered instructions when, to the extent that they are correct and applicable to the issues, they are included in substance in those given. p. 625.
11. MASTER AND SERVANT.—*Operation of Mine.—Competent Mine Boss.*—It cannot be said as a matter of law that an experienced

coal miner employed as a mine boss and holding a certificate of service and competency as such, as provided for by §§8591, 8592 Burns 1914, Acts 1905 pp. 78, 79, is a competent mine boss. p. 626.

12. MASTER AND SERVANT.—*Operation of Mine.—Examination by Mine Boss.—Statute Construed.*—It cannot be said, as a matter of law, that a visit to, and an examination of, the working places of a coal mine by a mine boss every other day will, regardless of the circumstances or the dangers to be anticipated, satisfy the statute (§8580 Burns 1914, Acts 1905 pp. 72, 73) requiring such a visit and examination at least each alternate day, since, under a proper construction of the statute, it is the duty of the mine boss to make the visits and examinations as often as the situation reasonably demands, but under no circumstances with less frequency than the statute requires. p. 626.

13. TRIAL.—*Deliberation of Jury.—Consideration of Interrogatories.*—The jury may properly consider the interrogatories either before or after the general verdict has been agreed on, or during the deliberations respecting the same, as the jury itself may determine. p. 628.

14. APPEAL.—*Refusal of Instruction.—Harmless Error.*—In an action against the lessee of a coal mine for the death of an employe, the error, if any, of the trial court in refusing to give an instruction that the jury might consider the interrogatories either before or after they had agreed on the general verdict was harmless, where the interrogatories called for facts concerning but a single branch of the case and the answers were substantially in harmony with the facts as claimed by the defendant. p. 628.

From Gibson Circuit Court; *Simon L. Vandever*, Judge.

Action by William H. Rainey, administrator, against the Deep Vein Coal Company and the Princeton Coal Company. From a judgment for plaintiff, the defendants appeal. *Reversed*, as to Deep Vein Coal Company. *Affirmed*, as to Princeton Coal Company.

Lucius C. Embree and *Morton C. Embree*, for appellants.

William H. Rainey and *Harvey Harmon*, for appellee.

CALDWELL, J.—The averments of appellee's complaint are in substance as follows: That each

appellant is a corporation organized under the laws of Indiana for the purpose of mining coal; that, on February 27, 1913, appellant Deep Vein Coal Company was the owner of a coal mine in Gibson County, which prior thereto it, as such owner, had leased to appellant Princeton Coal Company for the purpose of having the latter operate it; that the latter, as lessee, on said day was, and for more than sixty days prior thereto had been, engaged in operating the mine with the full knowledge and consent of the former, and in so doing the latter employed and used more than ten men, towit, more than 200 men; that in the process of operating the mine entries were driven into the coal, from which entries rooms were turned off, among them being room No. 1, off of a designated entry, in which room there was a traveled way; that on said day, appellee's decedent, John Boger, was, and for more than sixty days prior thereto had been, in the employ of the Princeton Coal Company as a miner, and that on said day pursuant to the directions of the Princeton Coal Company he was and for two days prior thereto, had been, working in said room; that, during all the time decedent was working in said room, it was the duty of appellant Princeton Coal Company to use ordinary care to keep the room and the roof of the traveled way in a reasonably safe condition; that said appellant negligently omitted to perform such duty, and carelessly and negligently permitted the roof of the room to become unsafe, and with full knowledge of the condition of the roof and room, negligently failed to take down and remove therefrom certain loose slate and rock, and with such full knowledge of the condition of the roof over the traveled way said appellant on said day negligently directed the decedent to enter said room for

the purpose of mining coal; that decedent had no knowledge of the unsafe condition of the room, and thereupon, in obedience to the said orders of appellant Princeton Coal Company, and believing the room to be safe, he entered the room and proceeded along the traveled way towards his place of work, whereupon, after he had proceeded along said traveled way a distance of ten feet, large quantities of slate and rock fell from the roof on him and so injured him that as a consequence he died March 23, 1913, leaving surviving him, his widow, who was dependent upon him for support.

A trial resulted in a verdict against both appellants in the sum of \$1,350, on which judgment was rendered. Appellant the Deep Vein Coal Company has assigned as error the overruling, first, of its demurrer to the complaint; second, of its motion for judgment on the answers to interrogatories; and, third, of its motion for a new trial.

In order that the complaint may be held to state a cause of action against either appellant, it must appear therefrom that such appellant owed the decedent the duty to exercise reasonable care for his safety; that it failed to perform such duty, and that such failure resulted proximately in the infliction of the fatal injuries suffered by decedent. If the complaint discloses that appellant, the Deep Vein Coal Company owed decedent such a duty, that fact must be gathered from the allegations that said appellant was the owner of the mine; that it had leased it to its coappellant to be operated; and that the latter as lessee was operating it with the knowledge and consent of the former. Appellee argues that, by virtue of certain provisions of the Act of 1905 and amendments thereto made in 1911 (Acts 1905 p. 65; Acts 1911 p. 626; §8569, *et seq.* Burns 1914), such a duty on the part of the

Deep Vein Coal Company existed. Our attention has been called to no decision construing that act or a similar act of any other jurisdiction, in its relation to the question presented here, and we know of no such decision. We are, therefore, required to construe the act. Section 11, §8579 Burns 1914, requires that the operator of any coal mine in this state shall employ a competent mine boss, who shall be an experienced coal miner. Section 12, §8580 Burns 1914, provides in substance, among other things, that the mine boss shall visit and examine all working places in the mine when miners are working at least every alternate day and that such places be made safe and secure; and that, upon acquiring knowledge from his own inspection or other sources of the existence of loose coal, slate, or stone in the roof over the traveled ways used by miners in going to or from their places of work, he shall remove the same or cause it to be made secure by the use of timbers, a sufficient supply of which he is required to keep at hand for such purpose.

Appellee contends that the various duties specified by §12, *supra*, rested upon appellant Deep Vein Coal Company, by virtue of its being the owner of the mine, although it had leased it to its coappellant, and was not directly engaged in operating it. Appellee bases such contention on the provisions of §1 of the act (*supra*, §8569 Burns 1914), which, so far as material here, is as follows: "The term 'operator,' as used in this act, is hereby defined to mean any corporation, company, firm, person, proprietor, lessee, owner or occupier of any coal mine in this state, or any person upon whose account the mine is operated." An inspection of the various sections of the act discloses that the term "operator" occurs a number

of times therein. The duties of an operator are outlined with great particularity. These duties involve the details of working the mine. Thus, he is required to make or cause to be made from time to time progressive maps of mine extensions (§2, §8560 Burns 1914); to construct outlets and air and escape shafts as the work advances (§3, §8571 Burns 1914); to provide a specifically described cage with certain safety appliances to be used in lowering miners to the works and in hoisting them therefrom (§4, §8572 Burns 1914); to protect the openings of the mine, provide lamps and keep them lighted when the men are working, to install speaking tubes from the surface to the various compartments and to formulate a code of signals (§7, §8575 Burns 1914); to furnish accurate scales for weighing coal and to keep United States standard weights by which the scales must be tested each morning. There are specific directions to the operator respecting the weighing of the coal, with a provision that any dispute between him and the check weighman representing the miners, as to the accuracy of the scales shall be referred to the inspector of mines (§9, §8577 Burns 1914). The operator is prohibited from placing in charge of the hoisting engine any other than experienced, competent, and sober engineers (§10, §8578 Burns 1914), and is required to adjust the system of ventilation to the changing conditions of the mine and the varying numbers of workmen employed and animals used (§11, §8579 Burns 1914). These and other provisions of the act make it entirely clear that the term "operator", as used therein, has reference to the person, firm, or corporation actively and directly engaged in operating the mine.

An analysis of §1 leads to a like conclusion.

It would seem, as a matter of course, that it was not the legislative intent to declare that the term "operator" as used in the act means "any corporation, company, firm, person," etc., broadly stated and regardless of whether such corporation, etc., bears any relation to the mine. The evident legislative intent was that the term "operator", as used in the act, should be construed to mean and include only a corporation, company, firm, or person "upon whose account the mine is operated." It would be an absurdity to presume that the legislature intended or attempted by §1 to place upon a corporation having no interest in the mine the duties and liabilities of an operator under the act. The other terms used in the section, as "proprietor, lessee, owner, occupier," are so connected with those first quoted, as "corporation", etc., that if the clause, "upon whose account the mine is operated," limits the latter it must follow that it limits the former also. That is, it is only an owner or a lessee "upon whose account the mine is operated" that comes within the meaning of the term "operator" as used in the act. The section, by the use of the word "lessee", contemplates that the owner may lease a mine to another. If he may lease it, he may place the lessee in possession, with full power to operate on his own account and for his own profit, on compliance with the terms of the lease, as by the payment of rent or royalty, etc. That is, the section recognizes that the owner may by a valid contract deprive himself of the power to direct the workings of the mine, and yet, if the section is construed as appellee contends, the law would hold him responsible for results completely beyond his control and so beyond his control only for the reason that he acted pursuant to authority conferred by law. In such case,

the owner would be held responsible for the conduct of another person, where, although he has proceeded lawfully, he is powerless to direct or control such conduct. We have already developed from a consideration of the act in general that the term "operator" as used therein has reference to the person who is actively and directly engaged in operating the mine. If the mine owner was so engaged, then under the terms of the first section the duties and liabilities of an operator under the act rest upon him. If he has leased the mine and the lessee is operating it under the lease for his own profit, then he is the sole person chargeable under the act, where the owner has reserved no power of control.

It appears from the complaint that the Deep Vein Coal Company had leased the mine to the Princeton Coal Company, and that at the

1. time of the occurrence complained of the latter was operating the mine as lessee, and to that end that it employed the miners, including decedent, engaged in working the mine, and that it directed them in their work. In the absence of allegations to the contrary, it will be presumed that it paid the employes and the other expenses of operating the mine, and that it sold the product on its own account. Such presumptions flow legitimately from the allegations that it was operating the mine as lessee, and that it employed and directed the labor. Under such circumstances it does not appear from the complaint that the Deep Vein Coal Company was operating the mine or that it was being operated on account of such company. In fact, it affirmatively appears from the complaint that the Princeton Coal Company was operating the mine on its own account. It follows that the complaint, as predicated on the

theory that the Deep Vein Coal Company by the averments is brought within the meaning of the term "operator" as used in the act, fails to state a cause of action against such appellant.

Appellee argues that the statutory duty resting upon the Deep Vein Coal Company as owner to keep the mine in a reasonably safe condition was nondelegable; that performance thereof could not be committed by it to a lessee to its own exculpation. Appellee cites *Interstate Coal Co. v. Baxaverie* (1911), 144 Ky. 172, 137 S. W. 859; *Curvin v. Grimes* (1909), 116 S. W. 725; and *Fell v. Rich Hill, etc., Co.* (1886), 23 Mo. App. 216. It is true

that those duties, whether of statutory or
2. common-law origin, which rest upon a master relative to making safe the place where the servant is required to work, can not be delegated for performance to another, the master thereby escaping responsibility for results. *Brazil, etc., Coal Co. v. Young* (1889), 117 Ind. 520, 20 N. E. 423. The infirmity in appellee's argument, however, consists in the misapplication of the principle. The various duties specified by the statute here rest on the operator rather than on the owner.

3. The owner is the operator only where he retains control of the mine, or to the extent that he retains control of it, or where it is being operated on his account. The first two cases cited by appellee were decided under a statute requiring that "the owner, agent or lessee" of any coal mine to which the statute is applicable shall ventilate it in a specified manner. In each of said cases a miner who was an employe of an independent contractor suffered an injury by reason of defective ventilation. In the *Interstate* case, the owner had parceled out to independent contractors the respective compartments of the mine to be operated

at a specified price per ton for the coal produced, such contractors agreeing to look after the ventilating equipment. It was held under the facts of that case that the owner retained general control of the mine, and hence that he was liable. In the Curvin case a certain section of the mine was let to an independent contractor to be operated, the other parts of it being worked under the personal direction of the owner, who assumed all duties respecting ventilation. The owner was held liable on the theory that the mine was being operated as an entirety and that the owner was in fact operating it. In the Fell case, decided under a somewhat similar statute, an employe of an independent contractor was injured by reason of the use of certain defective machinery and its negligent operation. In a suit against the mine owner to recover for such injury, he was held liable; the basis of such liability being that by the terms of the contract, under which the independent contractor was operating, the mine owner obligated himself to furnish and operate such machinery. It is apparent that these cases are distinguishable from the case at bar. Here there is no averment that the Deep Vein Coal Company was operating the mine in whole or in part, or that it directed or conducted, or reserved the power or assumed an obligation to direct or conduct, such operations in whole or in part.

It is argued also that the leasing of the mine to the Princeton Coal Company was a mere subterfuge resorted to in an attempt to safeguard the

4. Deep Vein Coal Company from consequences likely to flow from negligent operation, and that in fact the latter company was the operator. If such a situation existed, and the Deep Vein Coal Company was in fact the operator, the com-

plaint, by proper averments, should have disclosed the fact. See *Nelson v. American Cement, etc., Co.* (1911), 84 Kan. 797, 115 Pac. 578; *Pottorff v. Fidelity Coal Min. Co.* (1912), 86 Kan. 774, 122 Pac. 120. Appellee sued on the theory that the Princeton company as lessee was working the mine.

There is a suggestion also that the Deep Vein Coal Company, independent of statute, and if its situation be measured by those common-law principles which control where the relation of contractee and independent contractor or that of landlord and tenant exists, may be held liable in this action. As a general rule, the contractee is not answerable for the acts of an indepen-

5. dent contractor. To such rule there are exceptions, among others, where the work committed to the contractor to be done is inherently dangerous although care be used, or where the necessary consequence of doing the work as specified in the contract is injury to another. *Julius Keller Constr. Co. v. Herkless* (1915), 59 Ind. App. 472, 109 N. E. 797, and cases; *Louisville, etc., Co. v. Hughes* (1909), 134 Ga. 75, 67 S. E. 542; *Embler v. Gloucester Lumber Co.* (1914), 167 N. C. 457, 83 S. E. 740; *Carson v. Blodgett* (1915), 189 Mo. App. 120, 174 S. W. 447. While the business of mining coal is declared by statute to be a dangerous industry (§8624a Burns 1914, Acts 1911 p. 658), yet the law recognizes it as a business proper to be regulated rather than that it should be prohibited, and that it may be prosecuted with reasonable safety if care be used. *Laffery v. United States, etc., Co.* (1910), 83 Kan. 349, 111 Pac. 498, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912A 590.

From the averments of the complaint it would seem that the relation existing between appellants

was in the nature of that of landlord and tenant, rather than that of contractee and independent contractor. In a case somewhat similar to the case at bar, the Supreme Court of Michigan, speaking by Justice Cooley, used the following language respecting each of these relations: "The owner may rent a mine, resigning all charge and control over it, and at the same time put off all responsibility for what may occur in it afterwards. If he transfers no nuisance with it, and provides for nothing by his lease which will expose others to danger, he will from that time have no more concern with the consequences to others than any third person. If instead of leasing he puts contractors in possession the result must be the same if there is nothing in the contract which is calculated to bring about danger. But if, on the other hand, he retains charge and control, and gives workmen a right to understand that he is caring for their safety and that they may rely upon him to guard against negligent conduct in the contractors and others, his moral accountability for their safety is as broad as it would be if he were working the mine in person; and his legal accountability ought to be commensurate with it." *Samuelson v. Cleveland, etc., Co.* (1882), 49 Mich. 164, 13 N. W. 499, 43 Am. Rep. 456. See, also, *Smith v. Belshaw* (1891), 89 Cal. 427, 26 Pac. 834.

There is no allegation here that the dangerous condition of which complaint is made existed at the time the lease was executed and the Princeton

Company was placed in possession, or that

6. such dangerous condition would result in the operation of the mine, although due care were used. In short, it sufficiently appears from the complaint that the Deep Vein Coal Company surrendered possession of the mine to the Princeton

Coal Company, retaining no control thereof, and in addition, there is a direct averment that the defective condition originated subsequently by reason of the negligence of the latter company in operating it. In fact the complaint contains no charge of negligence as against the former company. We are therefore required to hold that the complaint does not state a cause of action against the latter company on any theory, and that the court erred in overruling the demurrer thereto. *Deller v. Hofferberth* (1891), 127 Ind. 414, 26 N. E. 889; *Keeler v. Lederer, etc., Cor.* (1904), 26 R. I. 524, 59 Atl. 855; *Board, etc., v. Woodcliffe, etc., Co.* (1907), 74 N. J. Law 355, 65 Atl. 844; *Griffin v. Jackson, etc., Co.* (1901), 92 Am. St. 496, full note; *City v. Spaulding* (1849), 50 Am. Dec. 775, note; *Brady v. Klein* (1903), 133 Mich. 422, 95 N. W. 557, 62 L. R. A. 909, 103 Am. St. 455, 2 Ann. Cas. 464.

Without particularizing, it should be said also that the erroneous view entertained by the trial court respecting the sufficiency of the complaint against the Deep Vein Coal Company, manifested by the ruling on the demurrer thereto, extended also to a number of instructions given and refused in their relation to that company. Thus, for reasons indicated, the court erred as against said company in giving and in refusing certain instructions, especially Nos. 8 and 13, given at the request of appellee, and Nos. 2 and 7, given on the court's own motion, and in refusing Nos. 3, 4, 7, 10 and 12, requested by appellant. The court, however, did not err in overruling the motion of the Deep Vein Coal Company for judgment on the facts returned by the jury in answer to interrogatories, since, by such answers, it is disclosed that that company, through certain of its officers and agents,

participated in the operation of the mine. Other questions presented by the Deep Vein Coal Company, including the court's action in giving and refusing instructions, not specifically mentioned above, are not considered or decided.

Of the errors assigned by the Princeton Coal Company, all are waived, except that based on the overruling of its motion for a new trial. In support of such assignment, appellant Princeton Coal Company insists that the evidence is insufficient to sustain the verdict. Briefly stated, the evidence necessary to a consideration of the points made respecting its sufficiency was to the following effect: Appellant's decedent as an employe of said appellant was engaged in mining coal in a certain subterranean room, extending north and south, and turned off from a certain branch entry. Into this room a car track extended to near the face of the rear wall marking the limit to which the removal of coal had been accomplished in that direction. This track originally consisted of a single line, but shortly before the occurrence complained of, said appellant had laid an additional track paralleling the original track on the west and a few feet from it. On these tracks, cars were operated by hand power from the neck, or the passage leading to the room, to the face, for the purpose of transporting coal as it was mined. The tracks were designed to be used and were used by miners as walkways in passing to and from their work. There was evidence that in laying the additional track certain props placed to sustain the roof of the mine were removed, and that they were not replaced. It was a part of decedent's duties to push cars from the neck to the face, load them with coal as it was mined and return them to the neck. On February 27, 1913, while pushing a car toward

the face, a piece of slate, four feet by six feet, and estimated to weigh about a ton, fell from the roof on him inflicting injuries from which he subsequently died.

The only points made respecting the sufficiency of the evidence are that it was not shown that the loose condition of the roof was discoverable prior to the accident, or that said appellant had any notice thereof. Appellant, by urging only these points, impliedly admits that the condition existed, and that the evidence in all other respects not questioned is sufficient. Respecting the points made, there was evidence that the props referred to above were removed from near the section of rock that subsequently fell upon the decedent, and some evidence that in the fall a thin end of the section severed itself from the main body and did not strike decedent or rest upon him, and that one prop removed had stood under such thin end. Although it be conceded that none of the props removed stood directly under the rock which fell, and that they therefore did not directly support it, it is a fact established by natural law as a practical proposition that the sustaining force of a prop, when taken in conjunction with the cohesion of the rock, extends in each direction beyond the portion of the rock immediately supported, and that there will be no tendency of any portion of such rock to sever itself and fall until a point is reached remote from a prop, where the weight of the rock overcomes such extended sustaining force to the destruction of its own cohesion. If one of the props stood immediately under the section that fell, its removal deprived such section of direct support. In any event the removal of the props deprived the roof as a whole of support, the extended effect of which may reasonably be presumed to have extended to the section that fell. Ap-

pellant as a practical operator of a mine should be chargeable with knowledge of these facts. There was evidence also that the effect of removing props is the weakening of the roof as compared with its condition before the props were placed. Also that, in those cases where a loose condition of the roof can not be discovered by the eye alone, the fact may be ascertained by a process of sounding the rock, called "drumming", and that the condition here could have been so determined. There was evidence that the kind of rock that formed the roof here is always treacherous, and that it is necessary to inspect it carefully; also that this rock could have been supported without interfering with the mine operations; and that it could have been safely and easily taken down. There was evidence also that in a room extending north and south the roof was more likely to become loose than in rooms extending in the opposite directions. There was evidence also that, after the props were removed, decedent's fellow workman called the attention of the mine boss to the situation and requested him to support the roof with crossbars and props, and that workmen came into the room thereafter for that purpose under the direction of the mine boss, but failed to secure the roof because they did not have timbers of the proper size. Appellant at no time took any steps to ascertain the condition of the roof otherwise than by a visual inspection. We regard this evidence as abundantly sufficient to establish that the condition of the roof was discoverable by the exercise of reasonable diligence, and also to charge appellant with at least constructive knowledge of its condition. Under the statute, it was the imperative duty of the

7. appellant, through its mine boss, to visit this room at least every alternate day when miners were working therein, and to make a reason-

able inspection of the roof. Such duty is not discharged by mere visual examination, where the nature of the material forming the roof is of a kind that such an inspection will not be effective. Appellant stood charged with whatever knowledge such a reasonable inspection would have brought to it. It was the duty of appellant also to remove

or to secure by the use of timbers all loose

8. coal, slate, or rock discovered by such an inspection or otherwise, a sufficient quantity of which timbers it was required to keep on hand. §12, *supra*, §8580 Burns 1914; *Domestic Coal Co. v. DeArme*y (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *Princeton Coal, etc., Co. v. Downer* (1911), 48 Ind. App. 136, 93 N. E. 1009. The

9. evidence is sufficient to sustain the verdict as against the Princeton Coal Company.

Said appellant challenges the correctness of a number of instructions given, and also insists that the court erred in refusing others tendered. We should not be warranted in considering specifically each instruction respecting which complaint is made. As affecting the Princeton Coal Company the jury was instructed with substantial

10. accuracy, both as to instructions given and the refusal of others tendered. Of the latter, to the extent that they were correct and applicable they were included in substance in those given. However, in some particulars, instructions refused should be specifically considered. Thus, several instructions tendered and refused were to the effect that if the operator employed as a mine boss an experienced coal miner duly licensed under the laws of the state, and if such mine boss visited and examined the place where decedent was working either on the day of the accident and before

the happening thereof, or on either of the two days next prior thereto, for the purpose of visiting and examining such place, then that the operator thereby complied with the statute requiring that a competent mine boss who is an experienced miner be employed, and that he visit and examine the working place, etc., at least every alternate day, etc.

Perhaps *prima facie* a mine boss with the

11. qualifications indicated may be a competent mine boss, but we do not believe it can be said as matter of law that he is such. It is possible that one with such qualifications may in fact be incompetent, or he may at one time have been competent and subsequently have become incompetent. As to the other element of the tendered charges, the statute by the use of the phrase "at least" prescribes the minimum of visits. It can not be said as matter of law that regardless of the circumstances or the danger to be anticipated,

12. a visit each alternate day will satisfy the statute. By the terms of the statute properly construed, it is the duty of the mine boss to visit and examine as frequently as the situation reasonably demands, but in any event at least every alternate day.

The court in submitting interrogatories to the jury charged, at appellant's request, that they be answered upon a consideration of the evidence in the event of a general verdict. Appellant requested also the thirty-fifth instruction, which was refused by the court. It is as follows: "The law does not prescribe when you shall consider and answer the interrogatories that will be submitted to you, and you are at liberty to take them into consideration and answer them either before or after you have agreed upon a general verdict." In *Wabash R. Co. v. Gretzinger* (1914), 182 Ind. 155,

104 N. E. 69, the trial court submitted interrogatories and delivered them to the jury sealed in an envelope, with instructions that the jury should not open the envelope until they had agreed on a general verdict. The Supreme Court in that case condemned such a practice, but held it to be harmless under the particular circumstances there presented. In the course of the opinion the following language is used: "While it is true that the statute does not require the interrogatories to be answered in the absence of an agreement on a general verdict, we perceive no good reason why they should not be considered by the jury in deliberating on the general verdict, for it is obvious that such consideration might better enable the jury to make a conscientious general finding." See, also, *Southern R. Co. v. Weidenbrenner* (1915), 61 Ind. App. 314, 109 N. E. 926. The process by which a general verdict is reached, where the jury properly performs its full function, is as follows: First, the determining of all the material facts; second, the application of the law to such facts pursuant to the court's instructions. The result so arrived at is the general verdict. It is possible that in a given case the facts may be so numerous and so complicated that the jury may be unable to keep them in mind in order that they may be marshalled into the general verdict. A proper interrogatory deals with a single question of fact, necessarily considered also in properly arriving at the general verdict. A number of such interrogatories deals with a number or all of such essential facts. It follows, as a practical proposition, that interrogatories may perform the office of suggesting to the recollection of the jury material questions of fact which otherwise might be overlooked in arriving at the general verdict. It would, therefore, seem to

be not only proper but also a commendable practice for the jury to be left freely to consider the interrogatories at such a time in the course of their deliberations as will best enable them not only to answer such interrogatories truthfully and accurately, but also to arrive at a just general verdict. Such a rule would authorize the jury to consider

the interrogatories either before or after
13. the general verdict had been agreed on, or during the deliberations respecting the same, as the jury itself should determine. It is therefore our judgment that the tendered instruction might very properly have been given to the jury. In the present case, however, it is

14. not necessary that we determine whether the refusal of such instruction was error, for, if error, it was harmless as against the Princeton Coal Company. The other instructions given by the court to guide the jury in answering interrogatories are substantially the same as those on that subject in the Gretzinger case, *supra*. Moreover, by the interrogatories, the facts respecting but a single branch of the case are called for. The answers in the main are in harmony with what appellant claims such facts to be; that is, that the Princeton Coal Company as lessee, rather than the Deep Vein Coal Company, was operating the mine. Other facts found, tending to show that the latter was a joint tortfeasor with the former, are more favorable to the Princeton Coal Company than it claims the facts to be. Under such circumstances the refusal of such instruction, if error, was harmless. We find no error in the record justifying a reversal of the case as to the Princeton Coal Company.

The judgment is therefore reversed as to the appellant Deep Vein Coal Company, with instructions to the court to sustain its motion for a new

trial, and also its demurrer to the complaint, and for other proceedings in harmony with this opinion; and is affirmed as to the appellant the Princeton Coal Company.

NOTE.—Reported in 112 N. E. 392. Liability of mine owner for negligent injury to employe of independent contractor working in mine, 45 L. R. A. (N. S.) 930. What persons deemed to be independent contractors within meaning of rule relieving employer from liability, notes 65 L. R. A. 445; 17 L. R. A. (N. S.) 371. Delegation of master's duty as to place and appliances, note 54 L. R. A. 63. See under (1) 27 Cyc 721; (6) 26 Cyc 1568.

HELMS ET AL. v. COOK.

[No. 8,984. Filed February 25, 1916. Rehearing denied May 10, 1916. Transfer denied June 29, 1916.]

1. **APPEAL.—Review.—Assignment of Error.—Requisites.**—The assignment of error, to be sufficient as to any particular error attempted to be presented for review, must present to the appellate tribunal the precise question which was presented to the lower court for its decision. p. 631.
2. **APPEAL.—Joint Rulings and Exceptions.—Separate Assignment of Error.**—Coparties may not sever their pleadings, or motions in the trial court, and obtain separate rulings thereon and separate exceptions thereto, and then on appeal obtain a review of such rulings in the appellate tribunal by a joint assignment of error, and vice versa; and where the motion for a new trial, the ruling thereon and the exception thereto are joint, and the appellants in their brief elect to rely on a separate assignment of error, it is impossible for the court by looking to such motion, the ruling thereon or the exception thereto, to determine whether the question passed on by the trial court is identical with that presented by the separate assignment of error, and such assignment, therefore, presents no question for the consideration of the appellate court. p. 632.
3. **APPEAL.—Motion for New Trial.—Review.**—Where the motion for a new trial, the ruling thereon and the exception thereto are joint and appellants in their brief elect to rely on a separate assignment of error, the appellate court will not go behind the motion on which the ruling complained of is based and examine the several rulings and exceptions on which such motion is predicated to determine if all appellants were not affected alike by such motion and thereby ascertain that the question presented and decided below was identical with that presented on appeal, but the ap-

Helms v. Cook—62 Ind. App. 629.

pellate court will look only to the pleadings or motion on which the ruling assigned as error is based, the ruling itself and the exception thereto. p. 633.

4. **APPEAL.**—*Joint Assignment of Error.*—*Effect.*—A joint assignment of error must be good as to all who join therein or it will be good as to none. p. 635

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Action by Daisy Cook against Lucy Helms and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Christian & Christian, J. A. Roberts, Gentry & Campbell, Bell, Kirkpatrick & Voorhis, Emsley W. Johnson and Joseph W. Hutchinson, for appellants.

O. E. Snow, P. J. Fariss and Shirts & Fertig, for appellee.

HOTTEL, J.—Everett Cox died intestate in Hamilton County, Indiana, the owner of 200 acres of real estate in said county, subject to a life estate in 120 acres thereof in his father, Richard F. Cox, who has since died. Everett Cox was never married, and left surviving him no legitimate children.

Appellee claims to be the illegitimate child of Everett Cox, acknowledged by him during his life to be his own child, and hence entitled to inherit his estate under §3000 Burns 1914, Acts 1901 p. 288. Her complaint is in two paragraphs in the first of which she alleges that she is the owner in fee and entitled to the possession of said real estate, describing it, and asking judgment for the possession thereof, and in the second paragraph she alleges that she is the owner in fee of said real estate, and that defendants are claiming some interest therein adverse, etc., and asking that her title thereto be quieted. There was a trial by jury and a ver-

dict in appellee's favor on both paragraphs of the complaint. A joint motion for new trial, filed by all the defendants below, was overruled, and joint exceptions saved by them to such ruling. There was a judgment in appellee's favor on the verdict and from this judgment appellants appeal, and in their brief state the errors relied on as follows: "The court erred as to each appellant in overruling appellant's motion for new trial."

It is contended by appellee that the error relied on presents no question for the consideration of this court. In support of this contention appellee insists, in effect, that the record shows as above indicated that the motion for new trial, the ruling thereon, and the exception thereto were joint; that appellants in their brief have elected to stand upon the separate assignment of error, and hence that any other assignment is waived; that such separate assignment of error presents no question for the determination of this court. The assignment of error is the complaint in this court, and the errors relied on therein, to be available for reversal, must be such as to present for the determination of this court such questions as were presented to and ruled on by the trial court; that is to say, such assignment of error, to be sufficient as to any

1. particular error attempted to be presented for review, must present to the appellate tribunal the precise question which was presented to the lower court for its decision. *Hatfield v. Rooker* (1913), 56 Ind. App. 1, 104 N. E. 798; *Prescott v. Haughey* (1898), 152 Ind. 517, 521, 51 N. E. 1051, 53 N. E. 766; *Whitesell v. Strickler* (1906), 167 Ind. 602, 609, 78 N. E. 845, 119 Am. St. 524; *Towell v. Hollweg* (1881), 81 Ind. 154; *Harting v. Vandalia Coal Co.* (1911), 50 Ind. App. 98, 101, 98 N. E. 132. To give to the appealing party any wider latitude

than that indicated would invite imposition on the trial court, and require the exercise of original jurisdiction by the appellate tribunal by requiring it to determine questions not presented, or different from those presented, to the trial court for its decision.

The rule indicated is fundamental in appellate procedure, and on it is bottomed the repeated decisions of the Supreme Court and of this

2. court, to the effect that coparties may not sever their pleadings, or motions in the trial court, and obtain from such court separate rulings thereon, and separate exceptions to such rulings, and then on appeal obtain a review of such rulings in the appellate tribunal by a joint assignment of error, and vice versa. See cases cited, *supra*; *Starkey v. Starkey* (1905), 166 Ind. 140, 143, 76 N. E. 876; *Ewbank's Manual* (2d ed.) §138; *Elliott, App. Proc.* §318. Appellants, however, insist, in effect, that the more recent decisions of the Supreme Court recognize an exception to this rule, and in support of their contention cite the following cases, among others: *Whitesell v. Strickler*, *supra*; *Stamets v. Mitchenor* (1905), 165 Ind. 672, 75 N. E. 579; *Southern R. Co. v. Bretz* (1913), 181 Ind. 504, 104 N. E. 19. An examination of these cases will show that they are not in fact exceptions to the fundamental rule first above announced, but expressly recognize such rule. In each of those cases the appellate tribunal, by looking alone to the ruling assigned as error, the motion or pleading on which it was based, and the exception to the ruling, was able to say, and did say, in effect, that the assignment of error in the particular case being considered presented to the appellate tribunal for review the precise question presented to and passed upon by the lower court. In the instant case it would

be impossible for this court to say, by looking to the motion which is joint, and to the ruling thereon and exception thereto, which are likewise joint, that the question passed on by the trial court is identical with that which the separate assignment of error presents to this court for review. So far as this court knows, or can know, from an examination of said motion, ruling, and exception, it is at least possible that if the same motion had been filed separately by each defendant below, the ruling of the trial court thereon might have been different and in favor of some one or more of such defendants. It is, however, insisted by appellant, in effect, that an examination of the record will disclose that the rulings and the exceptions thereto on which said motion for new trial was predicated affected all the defendants below alike, and hence will disclose that the question determined by the trial court is the same as that which this court is asked to review. In other words, in order that this court may determine whether any question is presented by appellants' separate assignment of error predicated on a joint ruling and exception to a joint motion for new trial, appellants would have the court go behind the motion on which the ruling complained of is based and examine the several rulings and exceptions on which such motion was based to see if in fact the appellants were not all affected alike by such motion, and thereby ascertain that the question presented and decided below was in fact the same as that here presented. There is no authority that approves or warrants any such practice. The court,

3. in determining whether the question presented to this court for review is the same as that passed on by the trial court, will look only to the pleadings or motion on which the

ruling assigned as error is based, the ruling itself, and the exception thereto. We might add in this connection, however, that even if appellants be correct in their contention that each of the defendants below were affected alike by the ruling on the motion for a new trial that this would not necessarily mean that the question presented to the trial court and this court are identical. It is evident from the record in this case that the trial court did not regard the several rulings on which the grounds of the motion for new trial were based as affecting all the defendants alike. This is evident because certain evidence was admitted against some of the defendants, and not as against others, and the court in its instructions expressly told the jury that certain evidence should be considered only against the particular defendants indicated therein. It therefore affirmatively appears from the record that some of the defendants below had reasons for a new trial that were assigned in the joint motion therefor which the trial court had treated as affecting them alone, and which they could not get the benefit of by joining in a motion for a new trial with their codefendants who were not alike affected by such ruling. For the reasons indicated, the separate assignment of error relied on by appellants in their brief presents no question for our consideration.

It is suggested by appellants in their reply brief, and was also suggested in their oral argument, that the record discloses a joint assignment of error, and that they should have the benefit of such assignment. The original brief does not set out the assignment of error, and as already stated, indicates an intention on appellants to rely on the separate assignment of error. Assuming, however, without deciding, that appellants

should have the benefit of their joint assignment of error, it would avail them nothing in this case. Such assignment is by all the appellants named in the caption thereof, including those whom this court, in an opinion on a motion to dismiss the appeal (*Helms v. Cook* [1914], 58 Ind. App. 259, 108 N. E. 147), held were not legally substituted for certain deceased defendants, and including other appellants who were in no position to complain of the ruling on the motion for new trial. A joint assignment of error, like a joint complaint in the trial court, must be good as to all who join

4. therein or it will be good as to none. *Whitesell v. Strickler*, *supra*; *Orten v. Tilden* (1887), 110 Ind. 131, 10 N. E. 936, and cases cited; *Ditton v. Hart* (1910), 175 Ind. 181, 185, 93 N. E. 961.

The record as it comes to us presents no reversible error and the judgment below is therefore affirmed.

NOTE.—Reported in 111 N. E. 632.

STUDEBAKER BROTHERS MANUFACTURING COMPANY v. DEMOSS ET AL.

[No. 8,931. Filed June 30, 1916.]

1. HUSBAND AND WIFE.—*Husband's Debts.—Liability.*—Neither the wife nor her property are liable for the debt of the husband incurred before her decease, and she is under no obligation to make provision that such debt be paid out of her estate. p. 639.
2. WILLS.—*Devise.—Validity.*—A wife may validly make such a testamentary disposition of her estate that it cannot be resorted to for the purpose of collecting the debts of the husband incurred before her decease. p. 639.
3. STATUTES.—*Conflicting Provisions.—Repeal by Implication.—Descent.—Wills.—Husband's Election.*—The amendment to §3026 Burns 1914, §2488 R. S. 1881, by the proviso added thereto by the Acts of 1901 p. 118, giving to the surviving husband the property conveyed to him by the wife's will unless he elects to take under the law, repeals by implication the proviso embodied

in §3016 Burns 1914, §2485 R. S. 1881, by the Acts of 1891 p. 71, giving the surviving husband his rights under the law unless he elects to take under the will. p. 640.

4. **WILLS.—Rights of Devisees and Legatees.—Election.—Statute.**—Where a deceased wife has made a testamentary provision for her surviving husband, he has no right to elect to take from his wife's estate by the law of descent except as provided in §3046 Burns 1914, Acts 1907 p. 73. p. 642.
5. **WILLS.—Rights of Devisees and Legatees.—Election.—When Necessary.—Statute.**—Under §3046 Burns 1914, Acts 1907 p. 73, providing that if by the deceased wife's will property is devised to the husband or provision is made for him therein, he shall take under the will unless he elects to take in accordance with the laws of descent, the filing of an election to take by the will is of no effect, since the statute does not require such an election in order that a surviving husband may abide by his wife's will. p. 642.
6. **WILLS.—Rights of Devisees and Legatees.—Election.—Necessity of.—Statute.**—Where by the terms of the wife's will no property is devised to the husband or no pecuniary or other provision is made for him therein, he will take from her estate by the laws of descent irrespective of whether he files an election, since §3046 Burns 1914, Acts 1907 p. 73, requires the filing of an election to take by descent instead of the will only when there is a testamentary provision made for the surviving husband in the deceased wife's will. p. 643.
7. **WILLS.—Rights of Devisees.—Election.—Validity.—Statute.**—Under §3046 Burns 1914, Acts 1907 p. 73, providing that whenever any personal or real property is devised to any husband, or pecuniary or other provision is made for him in the will of his late wife, he shall take thereunder unless he elects to take by descent, any testamentary provision coming within the terms of the statute, no matter how small may be the value of the devise, obligates him to elect if he desires to take by descent, and his action in the premises, regardless of whether it is characterized by business acumen, is conclusive. p. 645.
8. **WILLS.—Rights of Devisees and Legatees.—Provision for Husband.—What is.—Election.—Statute.**—Where a deceased wife's will contains a provision that the husband execute the trust created by the will, with compensation provided for such services, and that he act as executor of the will, such provision involves enough of value to obligate him, if he desires to take from his wife's estate by descent, to make the election provided for in §3046 Burns 1914, Acts 1907 p. 73, which requires that the husband must elect to take by descent if the deceased wife has made provision for him in her will. p. 648.

From Decatur Circuit Court; *Alonzo Blair*,
Special Judge.

Studebaker Bros. Mfg. Co. v. DeMoss—62 Ind. App. 635.

Action by Eleanora Shields and another against the Studebaker Brothers Manufacturing Company and John W. DeMoss, sheriff. From a judgment for plaintiff, the defendant Studebaker Brothers Manufacturing Company appeals. *Affirmed.*

J. K. Ewing, for appellant.

John E. Osborn and *Frank Hamilton*, for appellees.

CALDWELL, C. J.—Appellant and appellee DeMoss filed a demurrer to the complaint of the other appellees, which demurrer was overruled. Appellees Shields, and Shields, trustee, filed a demurrer to appellant's answer, which demurrer was sustained. Judgment for refusal to plead over was rendered against appellant and appellee DeMoss, sheriff, that they be permanently enjoined as prayed, from which judgment appellant appeals, assigning error on the overruling of the demurrers.

The complaint is to the following effect: Ella H. Shields died testate December 5, 1912, the owner in fee of certain described real estate situate in the city of Greensburg, and survived by her daughter, appellee Eleanora Shields, and her husband, John W. Shields, who, as trustee, was also made an appellee, as her only heirs at law. By the terms of her last will and testament, which was duly probated, and of which her husband by its terms was named as executor, Ella H. Shields devised and bequeathed all her property, both real and personal, subject to the payment of her debts and expenses, to her husband, John W. Shields, in trust for the use, benefit, support, maintenance and education of appellee Eleanora Shields, alleged to be the daughter of testatrix, and John W. Shields, for which purpose he was directed to use the income from the trust, and the

principal or any part thereof if deemed by him to be necessary. The will provided that John W. Shields should take title only as trustee, and in that capacity he was specifically given full power of control, management and disposition, with a provision that in his discretion he might at any time terminate the trust by a conveyance of the trust property to the daughter. The will provided, also, that he might sell any of the trust property at any time at either public or private sale, with or without notice, for cash or on time, as he might determine, and by the will he was expressly authorized to sell or encumber any of the personal or real estate held by him as part of the trust property, without any petition to or permission or authority from any court, and without reporting any such sale to any court for approval, and that his conveyance as trustee should carry a good and perfect title to the property conveyed, without the approval of any court. There was also the following item:

“Said trustee, if he wishes the same, shall be allowed out of said trust estate liberal compensation for services rendered by him as such trustee, and he shall not be required to give any bond or render any account to any court of his acts and doings as such trustee.”

The will was executed July 23, 1904. Facts are alleged to the effect that John W. Shields on December 14, 1912, elected to abide by the will by the execution of an instrument as provided in §3047 Burns 1914, Acts 1907 p. 73.

Correctly construing the will, there is an allegation that John W. Shields has and holds the title to the real estate involved only for the use of Eleanore Shields, the beneficiary in fee, and that John W. Shields, the surviving husband of Ella H. Shields, has no interest therein. It is further alleged that in February, 1913, appellant in the

Decatur Circuit Court recovered a judgment against John W. Shields in his individual capacity, and that afterwards, in the same month, appellant caused execution to issue on such judgment, and to be delivered to appellee DeMoss, as sheriff, who thereupon levied such execution on the undivided one-third part in value of such real estate as the property of John W. Shields, and that he had advertised such one-third for sale under the levy. There follow the necessary technical averments, with a prayer for injunction and to quiet title.

Proceeding to determine the sufficiency of the complaint, if, notwithstanding the fact of the wife's will and the act pleaded as an election, John W. Shields, as surviving husband and heir of his deceased wife, took by descent the one-third part of the lands described in the complaint, this cause must be reversed; otherwise, affirmed. Appellant's judgment against John W. Shields was rendered after the decease of his wife, the probate of her will, and the filing of such election. If therefore John W. Shields, at the decease of his wife, became the owner of an estate in the lands described in the complaint, such judgment, under the facts alleged, did not at that time become a lien on such estate in the lands, as the judgment was not at that time in existence. The record does not disclose when or the circumstances under which the debt that formed the basis of the judgment was created. If before

the decease of the wife, then it may be said

1. that neither she nor her property was liable for its payment, nor was she under any obligation to make provision that it might be paid out of her estate after her decease. In short, if she took steps to dispose of her property
2. in such a way that it might not be resorted to for the purpose of collecting such debt, she did not violate any law by the mere fact of so

doing. If the debt was created after the decease of the wife, then the record brings to our attention no facts sufficient to constitute an estoppel in favor of appellant. Under such circumstances, the question here must be determined from a consideration of the relation existing between John W. Shields and his deceased wife's estate, and independent of equities in favor of appellant. The record presents no equities in appellant's favor as against the estate of testatrix, and it may therefore be awarded only those rights which are strictly legal. The question of whether John W. Shields inherited an interest in his wife's land must be determined solely from a consideration of his relation to the estate. If he did inherit such interest, appellant's right must be predicated solely on the fact of its judgment and the action taken thereunder. *Huffman v. Copeland* (1894), 139 Ind. 221, 38 N. E. 861.

The following statute has been in force since 1853: "If a wife die testate or intestate, leaving a widower, one-third of her real estate shall descend to him, subject, however, to its proportion of the debts of the wife contracted before marriage." §2485 R. S. 1881, §3016 Burns 1914. A proviso by way of amendment on the subject of election was added to this section in 1891 (Acts 1891

3. p. 71). This proviso was repealed by implication by an act passed in 1901 (Acts 1901 p. 118), amending §2649 Burns 1894, and need not be further noticed here. *Stiers v. Mundy* (1910), 174 Ind. 651, 92 N. E. 374. There being no debts of the class mentioned in §3016, *supra*, it follows by virtue of such section that the title to one-third of the lands described in the complaint vested in John W. Shields at the decease of his wife, notwithstanding her last will, and continued in him until appellant's judgment was rendered, and it

thereupon became subject to the lien thereof, unless such result is prevented by the operation of some other statute, or by some conveyance, estoppel or waiver. *Noble's Exrx. v. Noble* (1862), 19 Ind. 431; *O'Hara v. Stone* (1874), 48 Ind. 417; *Roach v. White* (1884), 94 Ind. 510; *Payton v. Monroe* (1899), 110 Ga. 262, 34 S. E. 305.

Appellee contends that, under the facts of this case, the effect of §3016, *supra*, is controlled and nullified by §2 of the act of 1907, and by the steps subsequently taken by John W. Shields, pleaded here, as an election, and which election appellees claim was authorized by such section, which is as follows: "That whenever any personal or real property be bequeathed or devised to any husband, or a pecuniary or other provision be made for him in the will of his late wife, such husband shall take under such will of his late wife, and he shall receive nothing from his wife's estate by reason of any law of descent of the state of Indiana, unless otherwise expressly provided in said will, unless he shall make an election to retain his rights in his wife's estate given to him under the laws of the state of Indiana, which election shall be made in the manner hereinafter provided." Acts 1907 p. 73, §3046 Burns 1914. Section 3047 Burns 1914, *supra*, provides that such election shall be in writing signed, acknowledged and filed substantially in form as was done by John W. Shields here. Appellees contend that §3046, *supra*, authorized the election pleaded here, and that John W. Shields therefore took no part of his wife's estate under the statutes of descent, and that his interest in such estate is measured by the terms of the will. Appellant, however, contends that the facts here do not bring this case within the scope of such statute

so as to render it applicable, for the assigned reason that by the terms of his wife's will no property was devised to John W. Shields, nor was there any pecuniary or other provision thereby made for him. To such argument appellees rejoin in effect that, if it be conceded that the existence of a property, pecuniary, or other provision is essential in order that such statute may be applicable, then the fact that John W. Shields was named as executor of the will, and trustee of the trust thereby created, with the stipulation that he should be compensated for his services in the latter capacity amounts to such a provision.

Directing our attention first to the act pleaded as an election, it will be observed that John W. Shields thereby signified his purpose and intention to abide by the will, and to relinquish all rights as surviving husband under the statutes of descent.

In such a case, as is presented here, the

4. right to elect is a creature of the statute, and is grounded only on the provisions of §3046, *supra*. Independent of that statute, such right of election does not exist. That statute authorizes a surviving husband to elect only in case he desires to retain his rights under the statutes of descent. In cases coming within the provisions of that statute, so that the right to elect exists, the surviving husband must elect "to retain the rights in his wife's estate given to him under the laws of the state," or he will be bound by the will. It follows that the act pleaded here as an election was of no effect, and that, if the above

5. statute is applicable, no part of his wife's estate passed by descent to John W. Shields, not by reason of such election to abide by the will, but because he failed to elect to retain his rights as aforesaid. The statute does not require an elec-

tion in order that a surviving husband may abide by his wife's will. *Fosher v. Williams* (1889), 120 Ind. 172, 22 N. E. 118.

We proceed to the question of whether the will here, when measured by the terms of §3046, *supra*, was of such a nature in its relation to the personal interest of John W. Shields as to invoke the statutory election on his part. Reading §§3016 and 3046, *supra*, together, by the former it is provided substantially that, if the wife die testate or intestate, one-third of her real estate shall descend to the surviving husband. Where that section controls, it is not within the power of the wife by will to deprive her husband of one-third of the real estate owned by her at her decease. The effect of §3046, *supra*, is to modify §3016, *supra*, under the circumstances outlined by the former. These circumstances are in substance that if, by the wife's will, property is devised or bequeathed to the husband, or a pecuniary or other provision is made for him, he shall not take by descent, but rather he shall take only what is given him by the will, unless he shall in manner and form as specified elect to take by descent. In such a case, if he fails to elect, he takes only under the will, unless the will expressly provides that the provision made for him is in addition to his statutory rights or some part thereof. The statute is silent respecting a case where, by the terms of the wife's will, no property is devised or bequeathed to the husband, and no pecuniary or other provision is made for him by the wife's will. In such a case, looking to the express language of §3046, *supra*, the

6. statutes of descent are not thereby modified or affected. Action on the part of the husband is not invoked. The will does not affect his interests. He may remain passive and thereby

he takes by descent. Such is the language of the statute, and we construe it as indicated. To such effect are the decided cases in other jurisdictions involving somewhat similar statutes. *Cummings v. Daniel* (1840), 39 Ky. (9 Dana) 361; *Loughborough v. Loughborough* (1854), 53 Ky. (14 B. Mon.) 549; *Smoot v. Heyser's Exr.* (1902), 113 Ky. 81, 67 S. W. 21; *Roberts v. Roberts* (1857), 34 Miss. 322; *Sperry v. Swiger* (1903), 54 W. Va. 283, 46 S. E. 125; *Burrall v. Bender* (1886), 61 Mich. 608, 28 N. W. 731; *Jochem v. Dutcher* (1899), 104 Wis. 611, 80 N. W. 949; *McGhee v. Stephens* (1887), 83 Ala. 466, 3 South. 808.

Doubtless the language of a statute might be such as to create the right or the duty to elect between a will and the statute of descent where no testamentary provision is made for the surviving spouse. In such a case, the broad alternative would be merely whether the will should stand as against a surviving husband or wife, or the statutes of descent should be given effect. Such is the holding of this court in *Traudt v. Hagerman* (1901), 27 Ind. App. 150, 60 N. E. 1011. That case, however, was decided under the proviso to §3016, *supra*, repealed as we said by said act of 1901 (Acts 1901 p. 118). The proviso to §3016, *supra*, differed so radically in its provisions from §3046, *supra*, that the Traudt case can scarcely be considered as either authoritative or controlling here. It may be said also that *Huffman v. Copeland*, *supra*, is scarcely in point here, since in that case there was a testamentary provision in the husband's favor, and weight is given to the fact that the will was made pursuant to a contract between the husband and wife. We proceed to determine whether by the terms of the will involved here any real or personal property was devised or bequeathed to the

husband, or whether thereby any pecuniary or other provision was made for him. The statute is to the effect that if any provision is made

7. for the husband by the wife's will, regardless of whether it be a property provision, a pecuniary provision, or a right not strictly classifiable as property, or not strictly of a pecuniary nature, the fact of such provision requires him to elect in manner and form as specified "to retain the rights in his wife's estate given him under the laws of the state," and failing so to do, he "shall take under such will of his late wife, and he shall receive nothing by reason of any law of descent of the state of Indiana, unless otherwise expressly provided in said will." The obligation to elect does not depend on comparative values. The provision made for him by the will may be very much less in value than his rights under the statutes of descent, or it may have no real marketable or monetary value, still, if it confers on him some benefit, he is put to an election. The fact of a provision made by the will, rather than its value, arouses the obligation to elect, and the election when made, either by actively choosing rights under the statute, or by passively surrendering them, is binding on him and all the world, regardless of whether it is characterized by the exercise of business acumen.

If provision is made for the husband by the will involved here, it consists in the fact that he is named as trustee of the trust thereby created, and also in that he is nominated as executor of the will. As we have indicated, the will provides that he shall receive out of the trust estate liberal compensation for his services in the former capacity, and he is entitled to reasonable compensation for services in the latter capacity also, although the

will does not expressly so stipulate. *Carter v. Harvey* (1899), 77 Miss. 1, 25 South. 862, is cited by appellees as conclusive on the proposition that appointment to the trusteeship created by the will and nomination to an executorship thereunder amounted to a provision for the husband under the statute which we are considering. That case, while to some extent applicable, is scarcely conclusive here. The scope of the decision is indicated by the following quoted therefrom: "The will of Mrs. Harvey did not fail to make any provision for her husband. The error of the counsel for appellant arises out of his reading into §4497 of our code the words any 'adequate' or 'sufficient' provision for the husband. * * * In the case before us there was no failure to make any provision by the will of the wife for the husband. He was made executor of the will and guardian of the infant children (then of very tender age), without bond, with the right to use the estate as he always had done, for the benefit of the infants. He thus had some provision made for him. Besides, the whole of the estate was bequeathed and devised to him absolutely in the event of the children of the testatrix dying before reaching their majority. These provisions of the will were satisfactory to the husband, for he has never renounced the will, and it is not for his creditors to renounce for him." The fact that, by the terms of the will in that case, there was devised to the husband a contingent remainder in fee in all the lands of which the wife died seized of itself constituted a substantial though conditional provision for the husband, and such fact possibly to some extent influenced the decision. Moreover, by the provisions of the will there, the husband was authorized as guardian to use the estate devised in supporting and maintaining

the infant children. As the husband was under not only a moral but also a legal obligation to support and maintain such children, it is apparent that the fact that he was to an extent relieved from such legal obligation by reason of the fund to that end created by the wife's will, amounted to a provision for him. It is held that a right created in one as trustee to use the trust property to aid him in rearing and educating his children constitutes in him "a beneficial interest of a pecuniary character." *Ex Parte Kilgore* (1889), 120 Ind. 94, 98, 22 N. E. 104.

By the terms of the wife's will in the case at bar, the trustee is authorized to use the income, and if necessary the principal, of the trust estate in maintaining and educating his daughter, the appellee Eleanora Shields. It is a reasonable inference from the will that, at the time of the execution thereof, the daughter was a minor; but the record fails to disclose her age at the time of the probate of the will. If more than twenty-one years of age at that time, the husband, of course, would be under no legal obligations personally to maintain or educate her. The Carter case then is scarcely parallel to the case at bar.

As we have said, the husband here is entitled to compensation for his services both as trustee and as executor. His right to serve as trustee is based entirely upon the will. The same may be said of his right to serve as executor, since the wife, had she chosen, might have named some one else to serve in either or both capacities. His right to compensation then, as indicated, is based entirely upon the will. It is true that in either capacity compensation received must be measured by services performed, and that the husband in executing such trusts renders to the estate as much

of value as he receives therefrom, and hence it is somewhat plausible to conclude that no provision is made for him by the will. The problem of electing one thing to the exclusion of another presents itself to the person interested as a practical proposition. He chooses as to him seems best under all the circumstances confronting him. As a practical proposition, the opportunity to dispose of a person's services for a compensation may under some circumstances—perhaps under all circumstances—be a very real and substantial benefit to such person. If the opportunity affording a person so to dispose of his services is to him a benefit of considerable magnitude under some circumstances, then under any circumstances, where he avails himself of such opportunity, some degree of benefit to him must be involved from his viewpoint, or he would have refused so to dispose of his services. As a practical proposition, his selection to a trusteeship of an extensive estate where the trust is to continue for a long period of time might have a very considerable pecuniary value. Under other circumstances, the pecuniary value of the trusteeship might be small. In the case at bar the monetary value to the trustee of the trust created by the will may be small or it may be large. On this subject the record does not advise us. Nor is it important in the determination of this cause. We conclude that the right created in the husband to

8. execute the trust created by the will and to serve as executor thereunder involves enough of value to amount to a provision made for the husband by his wife's will.

Had the husband here elected to take under the laws of descent, such fact would not have entirely destroyed the trust created by the will. The trust would have remained as to all the estate except

the part thereof that would have descended to the husband. Under such circumstances, also, the necessity for an executorship would have remained. It is perhaps true that the husband's election to take under the statutes of descent would not have been inconsistent with his continuing as trustee and executor. See *Macknet's Exrs. v. Macknet* (1873), 24 N.J. Eq. 277, 294; 40 Cyc 1987; *Mitchells v. Johnsons* (1835), 33 Va. (6 Leigh) 461. From these facts, it may very plausibly be argued that the situation did not present to the husband two inconsistent rights or interests, and hence that the terms of the will here are such as not to invoke an obligation to elect. Such argument, however, is not entirely sound as applied to the facts of this case. Had the husband elected to take under the statutes of descent the interest in his wife's estate that would thereby have become vested and certain in him, by the same act, he would have been released from the trust. Conceding then that the trust would have continued under the circumstances indicated, and that such an election would not have ousted him from the trusteeship, still, as indicated, the scope of the trust would thereby have been narrowed. In one case the trust would involve but a portion of the estate; in the other, it in fact involves the entire estate. By electing, as indicated, he would thereby have chosen to take a portion of the estate as his own, with the right to execute a trust in the balance thereof. By failing to elect, he chose to surrender any portion of the estate as his own, but with the right to execute a trust involving the whole thereof. We conclude that the court did not err in overruling the demurrer to the complaint. The question of whether a nomination to an executorship would

of itself constitute a provision within the meaning of the statute is not presented or decided.

We do not feel that we should be justified in setting out appellant's answer, or the substance thereof. After carefully considering it, we conclude that it falls far short of stating a defense to the cause of action as pleaded. The court did not err in sustaining a demurrer thereto. The judgment is affirmed.

NOTE.—Reported in 113 N. E. 417. Noncompliance with statute concerning election, effect, Ann. Cas. 1916C 1207.

TIEBEN ET AL. v. HAPNER.

[No. 8,967. Filed February 24, 1916. Rehearing denied June 30, 1916.]

1. BASTARDS.—*Acknowledgment.—Inheritance.—Legislative Power.—Statute.*—Section 3000 Burns 1914, §2476 R. S. 1881, providing that where a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed legitimate, is a proper exercise of the unlimited power of the legislature to prescribe the canons of inheritance, and such statute is effective in declaring that an illegitimate child coming within its provisions shall have the inheritable capacity of a legitimate child. p. 653.
2. BASTARDS.—*Inheritance.—Statute.*—Where plaintiff's mother instituted paternity proceedings before a justice of the peace and obtained a judgment that the defendant therein was plaintiff's father, and the mother subsequently married another who took plaintiff into his family, acknowledging her as his own child, she was thereby legitimized and had the same inheritable capacity as the legitimate children of such marriage, since the judgment rendered by the justice of the peace cannot be held to contravene the canons of inheritance as expressed in §3001 Burns 1914, §2476 R. S. 1881, which provides that where a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed to be legitimate. p. 654.
3. PARTITION.—*Sale of Lands.—Distribution.*—In an action for partition of lands descending to the parties as heirs of their deceased father, the plaintiff instituted suit against her two brothers, who had received advancements of \$5,000 each from the father and who had also inherited the interest in the lands of a deceased sister of the parties, the trial court found, when ordering a sale of the lands, that the plaintiff was entitled to one-fourth of the

value of the land, which she was entitled to have enhanced by her proportionate share of the \$5,000 advancements made to the brothers, and that the defendants were each entitled to three-eighths of the value of the land after deducting their advancements from the one-fourth interest inherited by each of them from their father, which finding was proper and not objectionable as augmenting the plaintiff's share by the interest of the deceased sister in the advancements made by the father to the defendants. p. 655.

4. PARTITION.—*Attorneys' Fees.—Payment of.*—Where the defendants in an action for partition in good faith, though unsuccessfully, resist the claim of the plaintiff to the land involved in the litigation, they should not be required to pay any part of the plaintiff's attorneys' fees. p. 656.

From Wells Circuit Court; *William H. Eichhorn*, Judge.

Action by Annie Hapner against John G. Tieben and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Simmons & Dailey and *J. F. Denney*, for appellants.

John H. LaFollette, *Emerson McGriff* and *J. H. Sell*, for appellee.

SHEA, J.—This was an action in the court below by appellee against appellants praying for the partition of certain real estate which, it is claimed, descended from George Tieben, Sr., to appellants and appellee as his lawful heirs. The complaint was in three paragraphs. To these paragraphs of complaint answers were duly filed. Demurrers were sustained by the court to the answer to the complaint. Appellants refused to plead further, and the cause was submitted upon certain partial answers upon the question of advancements, rents, and profits. The errors assigned are: (1) The sustaining of appellee's demurrer to the first paragraph of appellants' answer addressed to the second, third, and fourth paragraphs of complaint. (2) The overruling of appellants' motion for a new trial.

In view of the conclusion we have reached, we need not consider in detail errors argued with respect to the ruling of the court upon the demurrers to the answer filed by appellants. The complaint alleges, in substance, that George Tieben, Sr., and one Annie A. Osterman were married January 21, 1863; that appellee herein was the illegitimate daughter of Annie A. Osterman, born on the — day of May, 1862, before her marriage to the said George Tieben, Sr.; that appellee, then an infant about nine months old, was taken into the family of said George Tieben, Sr., and took the name of Tieben, and was from that time until her marriage, which occurred November 3, 1895, known and recognized as Anna Tieben, and was so called by George Tieben, Sr., and her mother; that she was taught to believe that said George Tieben, Sr., was her father; that said Tieben treated her at all times as his own child, and as he did his other children, and she was acknowledged by said George Tieben, Sr., as his child, so treated by him, and by him so held out to the public from the time of his marriage to the time of his death; that the mother of appellee died August 24, 1895, leaving as her sole and only children, appellee, appellants herein, and Ellen Tieben; that George Tieben, Sr., did not remarry after the death of his wife; that he left as his sole and only children born in wedlock appellants and Ellen Tieben, together with this appellee; that said George Tieben, Sr., died intestate October 21, 1904; that at the date of his death he was the owner in fee simple of the land described in the complaint, consisting of 62.29 acres. In her complaint appellee claims to be the owner of an undivided one-third interest in the value of said land, which was found to be worth \$4,650; that it was claimed that advancements had been

made to appellants George Tieben and John G. Tieben in the sum of \$5,000 each.

It is alleged in each paragraph of the answer that in February, 1862, Annie A. Osterman, the mother of appellee, instituted paternity proceedings against one Gerhard Kamp before a justice of the peace of Allen County, Indiana, in which proceedings said justice adjudged said Gerhard Kamp to be the father of such child. It is very strenuously argued that this judgment of the justice of the peace fixed the status of appellee in such manner that she could not thereafter become a legitimate heir of George Tieben, Sr.

Section 3001 Burns 1914, §2476 R. S. 1881, reads as follows: "If a man shall marry the mother

of an illegitimate child, and acknowledge

1. it as his own, such child shall be deemed to be legitimate." This statute fixed appellee's status if the evidence brought her within its provisions, regardless of the finding of the justice. This act substantially in its present form was first enacted January 2, 1817. (§9 St. 1824, C. 31.) It has been carried into each revision of the statute since that time. The statute is plain and unequivocal, and does not admit of construction. It may be laid down as a proposition which is beyond dispute that the legislature acted within its legitimate scope and power in enacting such statute. The power to prescribe canons of inheritance which shall absolutely determine the course of descent of all lands within this state is in the legislature. There is no limit upon its authority in such matters. The statute is effective in declaring that an illegitimate child thus acknowledged shall have the inheritable capacity of a legitimate child. *Harvey v. Ball* (1869), 32 Ind. 98; *Binns v. Dazey* (1896), 147 Ind. 536, 44 N. E. 644; *Haddon v. Crawford*

(1911), 49 Ind. App. 551, 97 N. E. 811; *Harness v. Harness* (1911), 50 Ind. App. 364, 98 N. E. 357.

The essential facts alleged in the complaint are without dispute. The court found that appellee was entitled to the one-fourth part of the real estate; that appellants were each entitled to a three-eighths part, subject to an advancement of \$5,000 each, chargeable against the one-fourth interest which they inherited from George Tieben, their father. The court finds that appellee was entitled to no part of the share of Ella Tieben, deceased, whose death occurred subsequent to that of her father, George Tieben, Sr.

If the legislature had intended that the child should become legitimate only in case of marriage by the father and mother, and subsequent

2. acknowledgment, the language of the act would have so provided. Many of the states which have a similar statute do so provide. In such statutes the language is that "if the father shall marry the mother of the illegitimate child," etc. So that we hold that the finding of the justice of the peace in this case can not contravene the legislative intent as unequivocally expressed. Upon this statement of the record no error was committed by the trial court in overruling the demurrers to the answers or in ordering a partition of the real estate upon the basis as above stated, of which appellants can complain.

It is next argued that the judgment of the court ordering the partition of the land would give to appellee, taking into account the advancements, a greater share than her one-fourth interest therein; in other words, it is argued that by the finding of the court the share given to appellee is augmented by the interest of the deceased Ella Tieben in the \$5,000 advancements charged against appellants.

The language of the judgment is, in substance, as follows: It is decreed by the court that appellee is the owner in fee simple of the undivided one-fourth part in value of the real estate described, which she is entitled to have enhanced by her proportionate share of \$5,000 advanced to each of the appellants; that appellants are each the owner of the undivided three-eighths part in value of said lands after deducting from the one-fourth interests inherited by each of them from their father their said advancements. It is ordered that the land be sold at commissioner's sale; that in making the disposition of the proceeds thereof the said advancements shall be taken into account and charged against said appellants as above stated. A commissioner was appointed to make the sale and distributed the proceeds thereof in accordance with the finding and judgment.

In order that there may be no misunderstanding as to this court's understanding of the decree, we shall state that, in the distribution of the proceeds of the sale, if it shall eventuate that the real estate shall not sell for \$10,000 or more, which, when augmented by the \$10,000 advanced appellants, would be an amount sufficient to make the one-fourth share of this appellee equal to the advancements charged against appellants, then the amount to be distributed from the proceeds of said sale shall be divided into two equal parts, one of which shall go to this appellee. The other shall be the interest which would have gone to the dead sister, inherited in this case by appellants. As we see it, this is in effect carrying out the court's intention in the order made. The judgment is not susceptible to the construction sought to be placed upon

3. it by appellant's learned counsel. The interest of appellee in the real estate is clearly stated, and a proper calculation can be made there-

from in accord with the judgment. Query: Whether appellee is not entitled to inherit from her deceased half-sister. §2996 Burns 1914, §2472 R. S. 1881. The question, however, is not presented, and we therefore do not decide it. *Miller v. Miller* (1883), 91 N. Y. 315, 43 Am. Rep. 669.

We find no error in the record which would warrant a reversal of this cause. Judgment affirmed. Moran, J., not participating.

ON PETITION FOR REHEARING.

McNUTT, J.—A very able brief has been filed by appellants on their petition for a rehearing of this cause, and the court has given very careful consideration to the only question raised thereby, viz., the construction that should be put upon §3001 Burns 1914, *supra*, and after such consideration, we are of opinion that this court is bound by the construction placed upon said section by the case of *Binns v. Dazey*, *supra*, and that such construction is correct.

But upon a re-examination of the record in this cause, we find that one matter raised by the assignment of error, and presented by appellants' brief, was not decided by the original opinion. It is contended by appellants that the trial court erred in finding and adjudging that, from the proceeds of the sale of the real estate, the costs of this action, including a reasonable fee for plaintiff's attorneys in this action, be first paid. It appears that appellants, the defendants in the court below, vigorously and in good faith resisted appellee's claim to any part of the real estate involved in the litigation. In such a case it has

been decided by the Supreme Court, and

4. rightly, we think, that the defendants should not be required to pay any part of plaintiffs' attorneys' fees.

In the case of *Bell v. Shaffer* (1899), 154 Ind. 413, 424, 56 N. E. 217, 221, it is said: "No reason exists why a defendant in a partition suit, who appears by attorney, to contest the title of the plaintiff, should be compelled to contribute to the payment of the attorney's fees of his adversary, and we can not believe that the statute was intended to subject him to such liability." See, also, *St. Clair v. Marquell* (1903), 161 Ind. 56, 67, 67 N. E. 693; *Osborne v. Eslinger* (1900), 155 Ind. 351, 58 N. E. 439, 80 Am. St. 240. It follows that the portion of the judgment directing appellee's attorneys to be paid a reasonable fee out of the fund derived from the sale, as part of the costs of the action, was erroneous.

The cause is remanded, with instructions to modify the judgment by eliminating therefrom the following portion thereof: "And a reasonable fee for plaintiff's attorneys in this action". It is ordered that the costs of this appeal be paid by the parties to the appeal in the following proportions: Appellee one-third and appellants two-thirds.

The petition for rehearing is overruled.

NOTE.—Reported in 111 N. E. 644, 113 N. E. 310.

VANDALIA RAILROAD COMPANY v. TOPPING ET AL.

[No. 9,133. Filed June 30, 1916.]

1. RAILROADS.—*Right of Way.—Grant.—Extent of Land Acquired by Grantee.*—Where the grant of a right of way to a railroad company contains no limitation as to the width of the way granted, the railroad company may, in the absence of any contrary agreement, occupy the width it could acquire under the statute (§5195 Burns 1914, §3903 R. S. 1881). p. 664.
2. RAILROADS.—*Right of Way.—Grant.—Title Acquired.—Evidence.*—Where a railroad company acquires a right of way by a grant containing no limitations as to its width, the question of how wide a way the grantee acquired by occupation, within the limits

fixed by statute, is one of fact to be determined by the aid of extrinsic evidence. p. 664.

3. **RAILROADS.—Right of Way.—Grant.—Character of Estate Acquired.—Easement.**—Under §5195 Burns 1914, §3903 R. S. 1881, providing that voluntary grants of real estate taken by a railroad corporation for a right of way should be held and used for the purpose of such grants only and not to exceed six rods wide, a railroad company, by a grant of a right of way, acquires but an easement in the land, the fee remaining in the grantor. p. 664.
4. **DEEDS.—Extent of Grant.**—While a railroad company may take an estate in fee, or a right of way of definite width, yet the parties may by contract create a less estate than a fee, or a right less in extent than that which the law authorizes the grantee to acquire. p. 665.
5. **APPEAL.—Ejectment.—Erroneous Instruction.—Presumption.—Theory of Pleadings.**—Where, in an action to quiet title against a railroad company, which by its cross-complaint claimed but a right of way across the land involved, the court instructed the jury that a fee-simple title means the highest title known to the law and that neither party could recover without establishing such title, such instruction was erroneous and presumed to be harmful, and informing the jury that the plaintiffs, who were claiming the fee, would have to show a fee-simple title to recover, and finding for them, does not cure the error as to the defendant, since a fee-simple title in one person and an easement in another are not incompatible estates. p. 665.
6. **EJECTMENT.—Exemplary Damages.—Statute.**—Section 1108 Burns 1914, §1062 R. S. 1881, providing that in actions in ejectment the jury may award exemplary damages in case of wanton aggression, does not apply where the defendant is shown to have acted in good faith under what he believed to be a valid right. p. 667.
7. **EXECUTION.—Evidence.—Title.—Sale of Land.**—To prove title by a sale on execution, or order of sale, the purchaser must show a valid judgment, an execution or an order of sale, and deed. p. 668.
8. **EJECTMENT.—Direction of Verdict.—Title in Fee Simple.—Evidence to Prove.**—In an action in ejectment it was not error for the trial court to refuse to peremptorily instruct the jury to find for the defendant because of the failure of the plaintiff to prove the record title upon which he relied to show ownership in fee-simple where the plaintiff also claimed title by prescription and produced evidence tending to prove such claim, since title by prescription is sufficient to support an allegation of title in fee simple. p. 668.

Action from Greene Circuit Court; *Theodore E. Slinkard*, Judge.

Action by George W. Topping and another against the Vandalia Railroad Company. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

Samuel O. Pickens and *Owen Pickens*, for appellant.

James M. Hudson and *A. G. Cavins*, for appellees.

MORAN, J.—This controversy is over a small tract of real estate in the village of Lyons, Greene county, Indiana. Appellees claim the fee-simple title to the same and assert this right in two paragraphs of complaint, one for possession and damages, and the other to quiet title. On the part of appellant, it claims the ownership as a part of its right of way for railroad purposes, and which it asserts by way of cross-complaint to quiet title. Upon issues being joined by an answer of general denial addressed to the complaint and cross-complaint by the respective parties, the cause was submitted to a jury, with the result that a verdict was returned in favor of the appellees, finding that they were entitled to possession and were damaged in the sum of \$450 by the unlawful detention, and that they were entitled to have their title quieted thereto.

A brief history of the surroundings and source of title, through which appellant claims, is material to an understanding of the questions presented for review under the error assigned on the overruling of its motion for a new trial, viz., the giving of instructions Nos. 13 and 16 by the court on its own motion and in refusing to give instruction No. 8 as requested by appellant, and that the verdict of the jury is not supported by sufficient evidence.

In the immediate vicinity of the real estate in controversy, the course of appellant's railroad is in a northeasterly and southwesterly direction, approximately at an angle of forty-five degrees, and in its course it crosses the northwest part of lot No. 6 in the village of Lyons, entering the lot a short distance south of the northwest corner and leaving the lot at about the same distance east of this corner. Appellees own thirty-eight feet off and along the west side of lot No. 6 lying south of appellant's railroad; the northern boundary depending upon the ownership of the parcel of land in dispute, which is a small strip paralleling the course of the railroad, and for the full width of appellees' tract of real estate. In March, 1913, appellant constructed a siding in connection with its main track, and in doing so it is contended by appellees that it encroached upon their real estate.

On July 6, 1866, Simeon Boon, who was the owner of considerable real estate in the vicinity of the village of Lyons, of which lot No. 6 is now a part, executed to the Indianapolis & Vincennes Railroad Company the following instrument of writing:

"I, Simeon Boon, of the county of Greene and State of Indiana, for and in consideration of the advantages which may or will result to the public in general and myself in particular by the construction of the Indianapolis and Vincennes Railroad, as may be surveyed or as the same may be finally located, and for the purposes of facilitating construction and completion of said work, do hereby for myself, my heirs, executors, administrators and assigns release, relinquish and forever quit claim to the Indianapolis and Vincennes Railroad Company the right of way for so much of said railroad as may pass through the following described piece, parcel or lot

of land in the county of Greene, in the State of Indiana, that is to say the southwest quarter of the N. E. S. 4 and range 6 west, and the right to cut and remove for my use such trees as may be standing near and liable to fall upon the track, said company to allow me to join my fences on each side of said land under the direction of the engineer so as not to obstruct the use of the tracks to pits in said railroad tracks to be put in by said company at their own expense, provided I give them notice that I require the same before the iron is laid; said company also to give myself and heirs the exclusive use of any of the land hereby released not needed for the road for the time being after the same shall be constructed so as in no wise to obstruct the road."

Following the execution of this instrument, and in the years of 1867 and 1868, the Indianapolis & Vincennes Railroad Company constructed its railroad over and upon the land described in the grant, which road has ever since been in operation as a railroad. Subsequent to the construction of the railroad, a part of the land in this vicinity and through which the road passed was platted into lots as a part of the village of Lyons, Indiana.

Upon the trial of the cause, in addition to the parties agreeing that Simeon Boon was the owner of the real estate described both in the complaint and cross-complaint, prior to the execution of the foregoing instrument in writing, the following further stipulation was entered into: "It is further stipulated by and between the parties that the Indianapolis and Vincennes Railroad company, a corporation, was the owner of the railroad referred to in the complaint and cross complaint for more than 20 years prior to January 1, 1905, and that on said date, the defendant Vandalia Railroad Company, a railroad corporation, succeeded the said

Indianapolis and Vincennes Railroad Company in such ownership and the title to said railroad thereupon became vested in defendant Vandalia Railroad Company, and it has ever since owned and operated the same."

Appellees allege in their complaint that they are the owners in fee simple of a given tract of real estate, which includes the part in dispute and their contiguous real estate not in dispute. Appellant in its cross-complaint alleges, "that it is the owner and in the possession of and for a part of its right of way for the maintenance and operation of its railroad" of a tract of real estate containing 1,663 square feet, lying within the general description of the part of lot No. 6 crossed by appellant's railroad in the village of Lyons, its boundary line being fifty feet on either side of the center of its main track, measured at right angles with the course of its road. Inasmuch as the technical measurements disclose an actual parcel of real estate claimed by both parties, and the parties so contend, and the principle of law involved not depending upon the nicety of the description, the opinion will not be further incumbered by setting the same out by metes and bounds.

For a number of years the real estate now owned by appellee was, and is now, being used for mill and warehouse purposes, the building thus used standing a short distance south of appellant's right of way. Likewise, a platform scale was installed several years ago in connection with the business conducted on appellees' premises, and in close proximity to appellant's siding. The mill, warehouse and scale are patronized by the public in general. Just south of the siding of appellant's railroad, and immediately north of the scale and paralleling the railroad between Main and Wash-

ington streets, Main street being north and Washington street west of lot No. 6, there is a driveway, which has been used by the patrons of the railroad and the business conducted on appellees' premises. Cars were loaded and unloaded from time to time as they were placed on the siding by using the driveway to reach the same. Before the siding was shifted to the south, the distance between the main track and the siding was about thirteen feet; but by the change the driveway is practically utilized by the siding, greatly impairing ingress and egress to appellees' place of business. For several years in the past appellant had planted from time to time property posts on this side of its road at various places at a distance of fifty feet from the center of its main track, under a claim that its right of way extended to this point. It built a sidewalk along the east side of Washington street for a distance of fifty feet on either side of the center of its main track, thus the walk on the south side was built to the point claimed as the boundary line by the appellant, but extends farther south than the point now contended for by appellees as marking the boundary line at this place.

Appellees' contention is that appellant by its grant is entitled only to the amount of real estate it heretofore actually took possession of in the operation of its road in this locality, and that the construction of the siding in March, 1913, where it now is brings appellant's railroad over and upon real estate not theretofore in its possession.

Appellant's position is that it has a right of way of 100 feet in width, and by measuring from the center of its main track fifty feet that the siding constructed, as aforesaid, is on its right of way.

There being no limitation in the instrument

as to the width of the grant from Simeon Boon to the Indianapolis & Vincennes Railroad Company, it had the right to occupy the width

1. it could have acquired under the statute, there being no further agreement; but as to whether it did so can only be ascertained by
2. resorting to the aid of extrinsic evidence, which is permissible. *Fort Wayne, etc., R. Co. v. Sherry* (1890), 126 Ind. 334, 25 N. E. 898; *Lake Erie, etc., R. Co. v. Michener* (1889), 117 Ind. 465, 20 N. E. 254; *Cincinnati, etc., R. Co. v. Geisel* (1889), 119 Ind. 77, 21 N. E. 470; *Indianapolis, etc., R. Co. v. Lewis* (1889), 119 Ind. 218, 21 N. E. 660. So this branch of the case resolves itself into a question of fact (*Campbell v. Indianapolis, etc., R. Co.* [1887], 110 Ind. 490, 11 N. E. 482), which was properly submitted as such to the jury.

At the time appellant's predecessor obtained the grant from Simeon Boon, the law providing for the incorporation of railroad companies

3. approved May 11, 1852, was in force (§5195 Burns 1914, §3903 R. S. 1881), which provides, among other things, that voluntary grants of real estate taken by a railroad corporation should be held and used for the purpose of such grants only, and not to exceed six rods wide. Under the grant in this case, the Indianapolis & Vincennes Railroad Company acquired but an easement as "the grant of a right of way is the grant of an easement and implies that the fee remain in the grantor. A person who has a right of way has nothing more than a right of passage, and can not be the owner of the *corpus* in the land. It is a settled rule that where the owner of the fee becomes the owner of the easement, the less estate is merged in the greater, but where one person owns only the right of way the fee is in the owner of the servient

estate. Here the only estate the deed professes to convey is the right of way, and consequently the fee remains in the grantor, since, where one party has a right of way, the other has the fee.

* * * Here the right is founded entirely upon contract, and not upon the proceedings under the right of eminent domain. The question is not what estate might have been acquired, but what estate did the one party bargain for and the other convey? It does not follow that because a railroad company may take an estate in fee, or a

4. right of way of a defined width, it does take such an estate, or such a right of way, for parties may by their contract create a less estate than a fee, or a right less in extent than that which the law authorizes the grantee to acquire." *Cincinnati, etc., R. Co. v. Geisel, supra; Chicago, etc., R. Co. v. Huncheon* (1892), 130 Ind. 529, 30 N. E. 636; *Abercrombie v. Simmons* (1905), 71 Kan. 538, 81 Pac. 208, 1 L. R. A. (N. S.) 806, 114 Am. St. 509, 6 Ann. Cas. 239.

Appellant did not by its cross-complaint, nor does it now, claim the ownership of the disputed parcel of land in fee simple. With this issue for consideration, the court on its own motion informed the jury, by instruction No. 13 that a "fee-simple title" meant the highest title known to the law, and that appellees could not recover upon their complaint without showing a fee-simple title, and the same was true as to appellant, that it could not recover upon its cross-complaint unless it established a fee-simple title. Appellant not proceeding upon the theory that it owned a fee-simple title,

5. this instruction was erroneous and must, under the circumstances, be presumed to be harmful in the absence of further explanation, which the instructions do not contain. It is

susceptible of the inference that, unless appellant had a fee-simple title to the real estate in controversy, it had no right or title whatever; this would be the logical deduction from the instruction. Informing the jury that appellees would have to show a fee-simple title or fail, and a finding in their favor does not obviate the error as to appellant, as a fee-simple title in one person and an easement in another are not incompatible estates or interests in real estate under the circumstances. *Muncie Electric Light Co. v. Joliff* (1915), 59 Ind. App. 349, 109 N. E. 433.

As to whether appellant claims the parcel of land in controversy as a part of its right of way under its original grant or by prescription can make no difference, for in either event its estate is that of an easement; and, while the authorities recognize that a fee may exist in an easement (*Branson v. Studabaker* (1892), 133 Ind. 147, 33 N. E. 98; *Meyer v. Pittsburgh, etc., R. Co.* (1916), 63 Ind. App. —, 113 N. E. 443), this would not free the instruction from its misleading tendency, as it naturally would impress itself upon the average juror, and especially in view of the fact that the jury was informed that a fee-simple title in land is the highest title known to the law.

Instruction No. 16 given by the court of its own motion, as complained of by appellant, informed the jury that, if it found that, in the taking of possession by appellant of the land in dispute, it did so in a wanton, aggressive manner, exemplary damages might be awarded to appellee. In actions for ejectment, it is provided by statute, "In cases of wanton aggression on the part of a defendant the jury may award exemplary damages." §1108 Burns 1914, §1062 R. S. 1881. In the *Century Dictionary and Encyclopedia*, "wanton" is defined

as follows: "Characterized by extreme recklessness, foolhardiness; malicious; recklessly disregardful of the rights or of consequences." In 13 Cyc 109, it is stated: "Where an act has been done in good faith, although it may result in serious injury to the defendant, there can be no recovery of exemplary damages. The question whether an act was wilfully or wantonly committed is important in considering the damages. Where the wrong is wilful or wanton, the jury is authorized to give any amount of damages beyond the actual injury sustained as a punishment and to preserve the public tranquility. But where the wrongdoer acts in good faith, with honest intentions, and with prudence and proper caution, although he may invade the rights of another, exemplary damages cannot be recovered." If appellant, in moving its side track over and upon the parcel of

6. real estate in controversy, acted under the belief that it was doing so under a valid right, in that the easement extended fifty feet from the center of the main track and the siding was constructed within this limit, the applicability of this instruction might well be questioned. In view, however, of the conclusion heretofore reached and what has been said here in reference to the law governing exemplary damages, we need not further extend the discussion in this respect, as the question raised is not likely to occur again upon a retrial of the cause.

Instruction No. 8 requested by appellant, and which it is insisted should have been given, was a peremptory charge in favor of appellant. Questions presented under the refusal to give this instruction are the same as the questions presented under the evidence, viz., that it is not sufficient to sustain the verdict, and will be presented as they

relate to the evidence. The immediate question thus presented, however, is that the appellees relied upon a record title to establish the allegations of their complaint that they were the owners in fee simple of the real estate in controversy, and that the record title does not support this allegation, and, being required to recover on the strength of their own title, they were not entitled to a verdict in their favor; that in the chain of their record title is a sheriff's deed, which only purported to convey an undivided interest of the judgment debtor; and that the execution was not produced and introduced in evidence. It is the law that in order "to prove title by a sale on execution, or order of sale, the purchaser must show a

7. valid judgment, an execution or an order of sale, and deed." *Indianapolis, etc., R. Co. v. Center Tp.* (1895), 143 Ind. 63, 40 N. E. 134, and authorities cited.

Appellees, however, contend that regardless of the record title, they have title by prescription, and inasmuch as title by prescription sup-

8. ports the allegation in the complaint of ownership in fee simple, the question thus raised and kindred questions as to the infirmity in the chain of title need not further be considered. *McWhorter v. Heltzell* (1890), 124 Ind. 129, 24 N. E. 743.

Judgment reversed, and cause remanded, with instructions to the trial court to grant appellant a new trial, and for further proceedings in accordance with this opinion.

NOTE.—Reported in 113 N. E. 421. Interest acquired by railroad company in lands purchased for right of way, 6 Ann. Cas. 242; 13 Ann. Cas. 432; Ann. Cas. 1916E 763.

SPURRIER v. VATER ET AL.

[No. 9,183. Filed October 3, 1916.]

1. MUNICIPAL CORPORATIONS.—*Public Parks.—Custody and Control.—Powers of Board of Public Works.—Statutes.*—Under §8747 Burns 1914, Acts 1905 p. 322, public parks in cities of the third and fourth classes are placed in the control and custody of the board of public works, which body is empowered by §8696 Burns 1914, Acts 1905 p. 278, to license the removal of gravel therefrom and to require a bond for damages occasioned by such work. p. 672.
2. NUISANCE.—*Public Nuisance.—Injunction by Private Person.*—Where, in an action instituted by a citizen of a municipality on behalf of the other taxpayers thereof to restrain the removal of gravel from a public park, the averments of the complaint show that the conditions resultant upon such work must be regarded as a nuisance which does not affect the plaintiff differently than the general public, he is not entitled to injunctive relief, since, in such a case, it is the general rule that equitable relief may not be invoked in the absence of a showing by the party aggrieved that he suffers a special and peculiar injury aside from that sustained by the public in general. p. 673.
3. MUNICIPAL CORPORATIONS.—*Unauthorized Acts of Officers.—Injunction by Taxpayer.*—A single resident taxpayer of a municipal corporation may maintain an action to restrain the unauthorized acts of public officers, such as the illegal disposition of public property, even though his interest and the injury complained of are not different from that of the public in general within such city. p. 674.
4. MUNICIPAL CORPORATIONS.—*Taxpayer Action.—Complaint.—Sufficiency.*—In an action by a taxpayer of a municipality to restrain the removal of gravel and sand from a public park, a complaint alleging that the removal of the sand and gravel was unlawful and as a result thereof expenditure of public funds would be necessary to restore the park to its original condition is insufficient, in the absence of an averment that no bond for damages was required by the board of public works as provided by §8696, cl. 12, Burns 1914, Acts 1905 p. 278, to predicate an action on the theory that the action of the board in disposing of the gravel and sand was unauthorized and illegal, since there is a presumption that the board, in exercising its statutory authority to license the removal of sand and gravel from public grounds, discharged the duty imposed on it by the statute of requiring a bond to indemnify the city for damages occasioned by the work of excavation. p. 676.
5. EVIDENCE.—*City Board of Public Works.—Official Acts.—Presumption.*—A city board of public works being charged with official

duties by statute, there is a presumption that such duties have been discharged in accordance with the requirements thereof. p. 676.

From Lake Superior Court; *Herbert S. Barr*, Special Judge.

Action by Frank Spurrier against William E. Vater and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

J. A. Gavit and *R. C. Martin*, for appellant.

Peter Crumpacker and *Fred Crumpacker*, for appellees.

MORAN, J.—Appellant unsuccessfully sought to enjoin the appellees from removing sand, gravel, and earth from a public park owned and controlled by the city of Whiting, Indiana. The question for review in this court is predicated upon the sustaining of appellees' demurrer to appellant's complaint.

It appears from the complaint that appellant is a taxpayer of the city of Whiting; that the city owns what is known as the Whiting Park, consisting of about twenty acres of real estate, which cost the city approximately \$75,000, and, since becoming the owner thereof, it has expended in excess of \$22,000 in improving the same, much of which was expended in the construction of piers and breakwaters along and adjacent to the shore of Lake Michigan, upon which the park abuts. Likewise a large amount of money has been expended in beautifying the park, in constructing driveways and planting shrubbery; that bath houses have been constructed and a bathing beach improved, and in many other ways the park has been made a place of recreation and a pleasure resort for the inhabitants of the city. When the suit was filed appellees with men and teams were engaged in

digging up and removing from the shore within the park sand and gravel, which belonged to the city by reason of its ownership of the park. In the process of removing the sand and gravel, excavations were made, leaving dangerous depressions in the shore line; and in the prosecution of the work driveways were constructed over and upon the park, straw and manure were thrown thereon, which gave forth a disagreeable odor and stench, to the great annoyance of appellant and the patrons of the park generally, and by reason thereof the park has become unsightly. By the removal of the sand and gravel the low-water mark of the lake in this locality is being extended, reducing the number of acres of the park; that in the future the depressions created by the removal of the sand and gravel will have to be filled by the city, which will impose a burden upon appellant and the other taxpayers of the city. That appellant and his family are accustomed to use the park and bathing beach frequently during the summer months, thus promoting their health and furnishing them a place of recreation and enjoyment. That the board of public works of the city of Whiting in its administrative capacity has authorized the removal of the sand and gravel and insists that it must permit appellees to remove and appropriate the same to their own use, and refuses to interfere with appellees in this behalf; that appellees have no right to do so; and that it becomes necessary for some resident taxpayer of the city of Whiting, and who is injuriously affected, to sue for the purpose of preventing the act complained of; that it is to the irreparable damage of the park, to appellant, and to the citizens of Whiting to permit the sand and gravel to be removed therefrom; that no adequate legal remedy exists, and resort

must be had to a court of equity. The suit was prosecuted on behalf of appellant and all other resident taxpayers, similarly situated, who reside within the city of Whiting. A permanent injunction was prayed. Upon these facts, which substantially cover the allegations of the complaint, is appellant entitled to injunctive relief?

The pleading discloses that the removal of sand and gravel was authorized by the board of public works; hence at the very threshold of our investigation we start with the basic principle

1. that it was within the authority of the board of public works to permit the removal of the same, as §8747 Burns 1914, Acts 1905 p. 322, provides that in cities of the class to which the city of Whiting belongs, "the board of public work shall have charge, control and management of all public parks and pleasure grounds belonging to any such city," etc. And by subdivision 12 of §8696 Burns 1914, Acts 1905 p. 278, the board of public works has power "to license the making of excavations in or the removal of coal, rock, gravel or other material from the surface or underneath the surface of any street, alley or public place of such city; and to require a bond for damages caused by such excavation," etc.

There being no fraud charged in the authorization of the removal of the sand and gravel mentioned in the complaint, and the board of public works having statutory authority, as we have seen, to authorize the removal, there is left for inquiry the condition created by the manner in which the sand and gravel was removed, and as to how the removal of the same will affect the taxpayers of the city of Whiting. The allegations of the complaint, which has to do with teams and wagons crossing over and upon the park, and the unsightly

condition created by the excavations and driveways, and the odor and stench emitted from the straw and manure strewn upon the ground, as described in the complaint, is such as must be regarded in its nature as a nuisance, and, further, it seems from the allegations of the complaint to affect alike all the patrons who visit the park, which is a public place. In other words, the unsightly appearance caused by the excavation and driveways and the odor and stench, all alleged to have been caused by appellees' conduct in the removal of the sand and gravel, does not affect appellant in a special or peculiar manner different from that of the public in general, and is an invasion of the rights of the public. This being true, appellant was not entitled to injunctive relief

2. in this particular. It may be stated generally that to warrant equitable interference the aggrieved party must show that special and peculiar injury personal to himself is occurring, or likely to result from the act complained of, aside from the injury suffered by the public. *City of Burlington v. Stockwell* (1897), 5 Kan. App. 569, 47 Pac. 988; *Manson v. South Bound R. Co.* (1901), 64 S. C. 120, 41 S. E. 832; *Bryant v. Logan* (1904), 56 W. Va. 141, 49 S. E. 21, 3 Ann. Cas. 1011; *Bancroft v. Bancroft* (1905), 61 Atl. 689; *Landes v. Walls* (1902), 160 Ind. 216, 66 N. E. 679; 22 Cyc 760; *McCowan v. Whitesides*, (1869), 31 Ind. 235.

It was held by the Supreme Court of West Virginia in *Bryant v. Logan*, *supra*, that citizens and taxpayers, stating no special harm different from that of others, could not enjoin the use of a lease, executed by the city for a part of a city park for the purpose of training and racing horses therein, and that, if the public use of the

park was impaired, the law afforded a remedy other than by injunction on the part of a taxpayer. So, if the theory of the complaint in the case at bar be regarded as seeking injunctive relief as against a nuisance, then we need not proceed further. Under the head of "Argument" in appellant's brief is the following: "The complaint in this case discloses the fact that the defendants were trespassing upon public property dedicated by the city of Whiting for park purposes." If this be regarded as charging appellant with the invasion of a public right, it is covered by what has been said heretofore and the conclusion there reached. However, under "Points and Authorities" appellant contends for a proposition, supported by

a line of authorities, which affords a taxpayer relief from the unauthorized acts of public officers, and which is distinguishable from the line of authorities which deals with the question of a public nuisance. In *Meyer v. Town of Boonville* (1903), 162 Ind. 165, 70 N. E. 146, the principal is thus stated: "The principle, however, which obtains as to public nuisances, does not apply in this State to actions brought by a resident taxpayer of a municipal corporation to enjoin an illegal or wrongful act, or, if consummated, to have relief against it. In such cases it has been uniformly held that one or more resident taxpayers may maintain such actions upon a mere allegation that they were resident taxpayers of such municipal corporation, when it was apparent that their interest and the injury complained of were not different in kind from that of the public in general within such corporate limits, but were the same."

In *Davenport v. Buffington* (1899), 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377, Sanborn J., speaking for the court, announced the rule as fol-

lows: "Indeed, under the modern decisions, the general rule is that a resident taxpayer of a municipality has sufficient interest, and has the right to maintain a bill to prevent the unlawful disposition of the money or property of his town or city, to forbid the illegal creation of a debt or liability of his municipality, and to restrain the diversion of money or property in his town or city from any public use in which he shares to which it has been dedicated."

Appellant's position in this particular is not that the authorities are unlawfully disposing, or attempting to dispose of the park itself, but that the acts of appellant will, in the future, necessitate the expenditure of public funds on the part of the municipality. The allegation in the complaint most favorable to appellant in this respect is that the wrongful conduct of the board of public works in permitting the removal of the sand and gravel will necessitate the expenditure of funds to restore the park to its original state in the way of filling the excavations made by the removal of the sand and gravel. In support of this contention, the case of *Brockman v. City of Creston* (1890), 79 Iowa 587, 44 N. W. 822 is cited, which announces the rule as follows: "The foundation of the doctrine is the interference with the rights of the taxpayer in the increase of the burden of taxation, or the liability thereto, by misappropriating the property of the city, which may demand the levy of taxes to acquire other property in its place".

Should the allegation that funds will be required in the future to restore the park to its former condition, by reason of the excavation of the sand and gravel, be regarded as an allegation of fact and sufficient to bring appellant within the rule an-

nounced, the pleading would still be insufficient in this behalf, for the reason that the dis-

4. position of the sand and gravel is authorized by the board of public works and the statute, which empowers the board to so authorize, also provides for such contingencies, as here disclosed, by requiring a bond from the parties so removing the sand and gravel to indemnify the municipality against loss by reason thereof. While the complaint alleges the removal of the sand and gravel to be unlawful, and that it will in the future cast a burden upon the taxpayers of the city of Whiting, this does not overcome the absence of an allegation that no bond was executed, as the law presumes that the board followed the statute. The board of public works being charged with official duties,

5. there is a presumption that it has and will discharge the duties imposed upon it and in accordance with the manner required by statute. *Brashear v. City of Madison* (1895), 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474.

After a careful consideration of the authorities in the light of the allegations of the complaint, we have reached the conclusion that the trial court did not err in sustaining the demurrer thereto. Judgment affirmed.

NOTE.—Reported in 113 N. E. 732. See under (2) 29 Cyc 1210; 17 Ann. Cas. 1128.

HOPKINS ET AL. v. MATTERS ET AL.

[No. 8,975. Filed April 21, 1916. Rehearing denied June 29, 1916. Transfer denied October 4, 1916.]

1. PLEADING.—*Demurrer*.—*Memorandum*.—An assignment of error predicated on the action of the trial court in overruling a demurrer to a plea in abatement presents no question for review where the record does not disclose that a memorandum was filed with the demurrer. p. 678.

Hopkins v. Matters—62 Ind. App. 676.

2. **APPEAL.—Review.—Harmless Error.—Ruling on Motion to Dismiss.**—It was not error for the trial court to overrule a motion to dismiss as to two of the defendants named in the original complaint when, before the filing of the motion, an amended complaint was filed which did not make such defendants parties. p. 678.
3. **APPEAL.—Assignment of Errors.—Matters Assignable.**—Neither the assignment that the court erred in sustaining defendant's plea in abatement, nor that it erred in rendering judgment abating an attachment proceeding is a proper independent assignment of error, and no question is presented for review by either of such assignments. p. 678.

From Pulaski Circuit Court; *F. J. Vurpillat*, Judge.

Action by Byron M. Hopkins and others against Thomas H. Matters and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

H. R. Robbins, W. C. Pentecost and C. M. Haft, for appellants.

Ralph E. Horner, Robert E. Thompson and John M. Spangler, for appellees

HOTTEL, J.—This is an appeal from a judgment rendered against appellants on their demurrer to a plea in abatement filed by appellee Matters. The errors assigned and relied on for reversal are as follows: “(1) The court erred in overruling the demurrer of the appellants to defendant's (Thomas H. Matters') plea in abatement. (2) The court erred in overruling appellant's motion to dismiss the cause of action as to James F. Fulton and Benjamin F. Lambert. (3) The court erred in sustaining defendant's plea in abatement. (4) The court erred in rendering judgment abating the attachment proceedings. (5) The court erred in abating the *lis pendens* notice. (6) The court erred in entering judgment of dismissal of the main action. (7) The court erred in entering judgment

of dismissal of the attachment. (8) The court erred in directing the clerk to dismiss the attachment proceedings, and in abating the cause of action."

It is insisted by appellee Matters that appellants have waived their right to be heard on the merits of their appeal by reason of certain irregularities in taking it, and on account of their failure to comply with the rules of the court in the preparation of their brief. However, for the purposes of a disposition of the case, it is not necessary to discuss or determine such questions. So far as the record and appellants' briefs disclose, no

1. memorandum was filed with the demurrer to the plea in abatement, and hence no question is presented by the first assigned error. *Pittsburgh, etc., R. Co. v. Home Ins. Co.* (1915), 183 Ind. 355, 108 N. E. 525; *Wagner v. Wagner* (1915), 183 Ind. 528, 109 N. E. 47; *Quality Clothes Shop v. Keeney* (1914), 57 Ind. App. 500, 106 N. E. 541.

No harm could have resulted to appellants by the ruling presented by the second assigned error.

This is so because appellants, before the

2. filing of such motion and the ruling thereon, had been permitted to file an amended complaint in which Matters alone was named as defendant. Appellees Lambert and Fulton not being parties to such amended complaint, there was no reason for a motion to dismiss as to them, and hence no available error is presented by the ruling on such motion.

Neither the third nor the fourth assigned error is recognized as a proper independent assign-

3. ment of error, and hence no question is presented by either of such assignments.

The disposition of the first assigned error, *supra*,

together with the fact that no question is presented by the appeal challenging the sufficiency of the evidence to sustain the decision of the trial court, in effect, disposes of the assigned errors from No. 5 to No. 8, inclusive. These several rulings and actions of the trial court are in accord with the finding and judgment abating the action, and are not erroneous, unless the court erred in its decision of the questions presented by the plea in abatement. There being no question, either of law or fact, properly presented against such plea, it follows that no available error is presented by either of the assigned errors Nos. 5 to 8 inclusive.

No reversible error being presented by the record the judgment below is affirmed.

NOTE.—Reported in 112 N. E. 248.

PENCE v. PENCE.

[No. 9,068. Filed October 4, 1916.]

1. *APPEAL.—Review.—Conflicting Evidence.*—Where the jury's verdict is supported by some evidence on every material fact involved, the appellate tribunal will not weigh conflicting testimony. p. 682.
2. *TRIAL.—Harmless Error.—Inapt Words in Instruction.—Cure by Other Instructions.*—While the use of the word "pecuniary" in connection with the words "loss" and "compensation" in an instruction on damages in a personal injury case is inapt and subject to criticism, yet the giving of the instruction so worded, in connection with another instruction accurately stating the elements of damage to be considered without referring to pecuniary loss, is not reversible error, since, viewing the instructions together, the jury could not have been misled as to the elements of damage by the use of the word pecuniary in the instruction complained of. p. 683.

From Grant Superior Court; *Robert M. Van Atta*, Judge.

Action by *Luella W. Pence* against *Martin Pence*. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

David P. Long and John A. Kersey, for appellant.

S. L. Stricler, for appellee.

FELT, J.—This is a suit for damages for personal injuries alleged to have been received by appellee on account of appellant's negligence in running his automobile into and against a buggy in which appellee was riding. The complaint in one paragraph was answered by a general denial and by a second paragraph of special answer. The case was tried by a jury and a verdict returned for appellee in the sum of \$825. Judgment was rendered on the verdict.

The only error assigned is the overruling of appellant's motion for a new trial. The grounds of the motion, which under the rules are fairly presented by the briefs, challenge the sufficiency of the evidence and the giving of instructions Nos. 6 and 8 on the court's own motion.

Appellant alleges in his special answer, and claims the evidence conclusively supports the averments, that appellee was in a buggy drawn by a horse driven by her husband on a public highway; that he drove his automobile to the rear of the buggy, going in the same direction, and when about 300 feet from the buggy, he sounded his gong several times, and the horse drawing the buggy started to turn to the right to let him pass; that in so approaching he drove to the left so as to give the buggy more than half the traveled portion of the road; that he reduced the speed of his car and allowed a reasonable time for the horse and buggy to move to the right side of the road so he could pass, and that he could have done so in safety, but just as he neared the buggy the horse stopped suddenly while the left

rear wheel of the buggy was still in the rut or traveled portion of the left side of the highway; that he did all he could to avoid striking the buggy but was unable to do so because of the facts aforesaid; that the collision was due wholly to the stopping of the horse, as aforesaid, and not to any fault or negligence of appellant.

It is quite apparent that the special answer is only an argumentative general denial, but it is not questioned, and serves the purpose of presenting appellant's view of the case.

Appellant contends that under the act of 1909 (Acts 1909 p. 328), it was the duty of the driver of the horse drawing the buggy, on signal of his approach, to drive to the right so as to give appellant half of the traveled portion of the highway, and that he failed so to do, and, after starting to drive to the right, stopped suddenly as above stated. The statute in question contains such provisions, but, whatever effect it may have in other cases, it can not in this case be given the effect contended for by appellant, for the reason that there is a conflict in the evidence. Some of the evidence tends to support appellant's contention, but there is evidence tending to show that the horse did not stop until after the automobile struck the buggy; that the left wheels of the buggy were to the right of the center of the highway in the central part of the traveled portion of the road when the buggy was struck; that appellant was driving at a high, dangerous and unlawful rate of speed just before and at the time he struck the buggy, and that there was ample room for appellant to pass without striking the buggy; and that the roadway to the left of the buggy was clear and comparatively level. The jury heard the evidence and decided

against appellant. The verdict is supported by some evidence on every material fact involved, and it is not the province of this court to weigh conflicting testimony.

The objection to instruction No. 6, given on the court's own motion, is that it is not applicable to the issues of the case and assumes the fact of appellee's injury. The instruction deals with the subject of contributory negligence as a defense and, when fairly construed, is not open to either objection urged against it.

The objection urged against instruction No. 8 is that it assumes that appellee had suffered some pecuniary loss as a result of appellant's alleged negligence, and that the jury was told they could consider such loss in assessing damages. The instruction states: "If you find from the evidence that plaintiff is entitled to recover a verdict * * * in determining the amount of damages to be assessed the jury may consider the pecuniary loss or damages suffered by plaintiff as a result of the negligence of the defendant complained of in the complaint. You may consider the pain and suffering, if any, by the plaintiff, the nature and extent of her injuries, as whether they are of a temporary or permanent nature, * * * and award such damages as in your judgment will be a pecuniary compensation for the damages she has sustained not exceeding the amount demanded in the complaint." Instruction No. 6, given at the request of appellee, was also on the measure of damages, and it accurately states the elements of damage that may be considered in such case without referring to pecuniary loss. By the phrase "pecuniary compensation" the court evidently intended to convey the idea of a money judgment and did

not thereby authorize a recovery for loss of wages or earning capacity as asserted by appellant.

The instructions as a whole correctly informed the jury as to their duty and limitations in assessing damages, if they found for the plaintiff, and though the use of the word "pecuniary" is inapt and

2. subject to criticism, the giving of instruction No. 8 in connection with the other instructions is not reversible error, as it could not have misled the jury.

Judgment affirmed.

NOTE.—Reported in 113 N. E. 751. See under (2) 38 Cyc 1595.

KEELEY v. BRADFORD.

[No. 9,135. Filed October 4, 1916.]

1. APPEAL.—*Briefs.—Appellee's Failure to File.*—Where the appellee fails to file briefs the Supreme and Appellate Courts may, in their discretion, deem such failure as a confession of the errors assigned by appellant. p. 684.
2. APPEAL.—*Burden of Showing Error.—Presumption.*—The appellate tribunal will presume that the judgment of the trial court is correct, and on appeal the burden is on the appellant to properly present error which will entitle him to a reversal. p. 684.
3. APPEAL.—*Briefs.—Appellee's Failure to File.—When Confession of Error.*—The appellee's failure to file briefs will not be deemed a confession of error when no error is, in fact, presented by appellant's briefs. p. 685.
4. APPEAL.—*Insufficiency of Briefs.—Dismissal.*—Where appellant's briefs do not set out enough of the record to present the questions relied on for reversal they fail to comply with Rule 22, cl. 5, of the Supreme and Appellate Courts, and the appeal will be dismissed. p. 685.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by Jesse B. Bradford against Thomas F. Keeley. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

LeGrand T. Meyer, for appellant.

Nye & Davis, for appellee.

HOTTEL, P. J.—This is an appeal from an order and judgment setting aside a former judgment in an action brought by appellee against appellant under §405 Burns 1914, §396 R. S. 1881. A demurrer to an amended complaint was overruled. A general denial, accompanied by appellant's affidavit in opposition to the petition, was filed, whereupon the cause was submitted to the court for trial, with the result before indicated. A motion for new trial was overruled. The rulings on said demurrer and motion for new trial are assigned as error in this court, and relied on for reversal.

Appellee has filed no brief, and appellant asks a reversal of the judgment on the ground that appellee by his failure to appear and file briefs, confesses that reversible error was committed

1. by the trial court. It is true that the failure on the part of an appellee to file briefs has always met with the positive disapproval of the Supreme Court and this court, and the discretionary right or power of such courts to treat such failure as a confession of the errors assigned by appellant has been recognized and declared. *Berkshire v. Caley* (1901), 157 Ind. 1, 60 N. E. 696; *Neu v. Town of Bourbon* (1901), 157 Ind. 476, 62 N. E. 7; *People's Nat. Bank, etc. v. State* (1902), 159 Ind. 353, 65 N. E. 6; *Moore v. Zumbrun* (1904), 162 Ind. 696, 70 N. E. 800; *Burroughs v. Burroughs* (1903), 180 Ind. 380, 103 N. E. 1. However, the judgment of the trial court comes to the appellate tribunal with
2. every presumption in its favor, and the burden is always on the appealing party to properly present to this court, by record and

Moynihan v. Rockhill—62 Ind. App. 685.

briefs which meet the requirements of the law and the rules of the court, at least one error which will entitle him to a reversal of the judgment appealed from. *Spork v. International Harvester Co., etc.* (1914), 58 Ind. App. 112, 107 N. E. 740, and cases there cited. This court will not treat appellee's

failure to file briefs as a confession of error,

3. when no error is in fact presented by appellant's briefs.

In this case appellant has not set out the complaint or the memoranda accompanying the demurrer thereto, and it would be impossible for this court to determine from appellant's briefs, without resort to the record, whether the ruling on said demurrer was right or wrong, nor can it tell, without resort to the record, whether any error is presented by the ruling on the motion for new trial.

Appellant's briefs wholly fail to meet that

4. requirement of the rules of the court which makes it necessary to set out in the brief enough of the record to present each question relied on for reversal. Rule 22, cl. 5; *Wilt v. Board* (1913), 54 Ind. App. 240, 102 N. E. 878; *Davis v. Broyles* (1913), 55 Ind. App. 316, 317, 103 N. E. 815, and cases there cited.

For the reasons indicated, the appeal is dismissed.

NOTE.—Reported in 113 N. E. 748. See also Ann. Cas. 1914A 485.

MOYNIHAN ET AL. v. ROCKHILL.

[No. 9,125. Filed October 4, 1916.]

CONTRACTS.—*Validity.—Salary of Public Official.—Assignment.—“Pooling.”*—Where A and B, owners of a majority of the capital stock of a newspaper publishing company to the management of which each devoted all of his time, entered into an agreement immediately prior to A's acceptance of an offer of an appointment to the position of postmaster, which would require all his time, whereby B undertook to perform the services previously rendered

the newspaper company by both parties and in consideration therefor A agreed to pay B a sum equal to one-half his salary as postmaster, such agreement is not invalid or illegal as being an assignment of either an earned or an unearned salary of a public officer, or a pooling of A's salary of postmaster with the income of the newspaper company.

From Allen Superior Court; *David E. Smith*, Special Judge.

Action by William W. Rockhill against Andrew J. Moynihan and another. From a judgment for plaintiff on his demurrer to the answer, the defendants appeal. *Reversed.*

Barrett, Morris & Hoffman, for appellants.

Thomas & Townsend and *Samuel L. Morris, Jr.*, for appellee.

McNUTT, J.—This was a suit, in the court below, by appellee, Rockhill, against appellant to recover one-half of \$1,430.76, for postage refunded by the United States government to the appellant, Journal-Gazette Company. To the complaint the appellant, Journal-Gazette Company, filed a counterclaim, and both appellants answered the complaint by their separate and several set-off. Appellee's demurrer was sustained to said answer of set-off, and this is the only error relied upon for reversal.

The answer of set-off reads as follows: "For a second and further paragraph of answer by way of set-off to the plaintiff's complaint the defendants separately and severally say, they admit that the Journal-Gazette Company collected \$1,430.76 of overpaid postage from the United States Government in the year 1913; that the plaintiff and the defendant, Moynihan, were the owners of a majority of the capital stock in the Journal Company; that the Journal Company is a corporation organized under the laws of the State of Indiana; that the

plaintiff and defendant, Moynihan, together held a majority of said stock and an equal amount of said stock was owned by each of them; that the Journal-Gazette Company is a corporation organized under the laws of the State of Indiana, and has assigned to it all the rights, property and securities belonging to the Journal Company and said Journal-Gazette Company has assumed all indebtedness of said Journal Company; * * * that the defendant, Andrew J. Moynihan, purchased the capital stock of this plaintiff in the Journal Company in 1903, and at said time there was due the Journal Company the said sum of \$1,430.76 as over-paid money for postage from the United States Government, and at the time said Moynihan purchased said Rockhill's interest in said Journal Company there was due the Journal Company the sum of \$1,430.76 from the said United States Government. That the Journal-Gazette Company now owns all the property formerly owned by the Journal Company and that all of said property formerly owned by the Journal Company was assigned to the Journal-Gazette Company in the year 1907. That it collected in the year 1913, from the United States Government the said sum of money, to wit: \$1,430.76.' Defendants further say that the Journal Company was organized under the laws of the State of Indiana for the purpose of publishing a democratic daily and weekly newspaper in the city of Fort Wayne, Indiana, and that said Journal Company did publish a democratic daily and weekly newspaper from the time said company was incorporated, May 13th, 1884, until the year 1907, when the Journal-Gazette Company was incorporated under the laws of the State of Indiana; that said Democratic daily and weekly newspaper was then published by said Journal-Gazette Company

from said date and is still being published by said company. That after the political campaign of 1892 and after the election of the Honorable Grover Cleveland as president of the United States and after the election of the Honorable William F. McNaghy of Columbia City as the Congressman from the Twelfth District of Indiana, the said McNaghy offered to recommend the plaintiff herein to be nominated and appointed postmaster of the United States Post Office in the city of Fort Wayne; that at said time the said plaintiff and defendant, Moynihan, were the owners of the capital stock of said Journal Company and were both giving their entire time to the publication of its newspaper. That at that time and for a long time prior thereto the Journal Company had been handicapped by lack of sufficient moneys to properly operate its business; that it was struggling financially to succeed and was requiring new machinery and new equipment in order to successfully print its newspapers; that the successful publication of daily and weekly newspapers of said Journal Company and the caring for the printing of said company demanded the sole attention of both the plaintiff and defendant, Moynihan; that at the time when the said McNaghy offered to recommend said Rockhill as postmaster for said post office in said city of Fort Wayne the said Rockhill, plaintiff herein, agreed with the defendant, Moynihan, that if said Moynihan would take sole charge of the property of the Journal Company and would manage the printing and the publication of its newspapers and in addition thereto would give to said plaintiff, Rockhill, one-half of the earnings of said Journal Company, that he, Rockhill, would accept the offer of said McNaghy and become postmaster of the United States post office at the

city of Fort Wayne, Indiana, and would pay the defendant, Moynihan a sum equal to one-half of the money received by him as salary as postmaster of the city of Fort Wayne, Indiana. That said agreement was then made and entered into by and between said Rockhill and said Moynihan and in the furtherance thereof said Rockhill was appointed postmaster of the United States post office at Fort Wayne, Indiana, and took his position as such postmaster on the 19th day of July, 1893, and held said office continuously for four years until July 19th, 1897; that during said time the said Rockhill drew salary as such postmaster in the sum of \$12,800 or \$3,200 per year; that the defendant, Moynihan, carried out the agreement above referred to and operated said Journal Company's newspaper plant for said 4 years and gave to said Rockhill earnings on his stock without making any charge for doing the work of himself and Rockhill combined, but that the said plaintiff, Rockhill, failed and refused to carry out his side of the agreement and did not and never has paid to said defendant any moneys as representing the sum equal to one-half of the money received by Rockhill as salary as postmaster of said city of Fort Wayne, and that as a result of said agreement there is due the said Moynihan from said Rockhill the sum of \$6,400.00; that said Moynihan has assigned all his rights, title and interests in and to said amount of money or claim from said Rockhill to the Journal Company, codefendant herein. That on the 3rd day of June, 1913, the said Journal-Gazette Company made a demand upon said plaintiff that he pay it said sum of money and that the said Rockhill, the plaintiff herein, has refused to make such payment. Wherefore, defendant, Journal-Gazette

Company, prays the court that it may have judgment against said plaintiff for said sum of \$6,400.00 and the interest thereon allowed by law and for all other proper relief in the premises."

Appellee demurred to said answer for want of sufficient facts to constitute a defense to the complaint, for the following reasons: (1) "That each of said separate and several paragraphs of answers of the defendants is scandalous; that each sets up an unlawful agreement on the part of the defendants, Andrew J. Moynihan and the Journal-Gazette Company to procure an office for the plaintiff in consideration that plaintiff would share with said defendants the salary of said office or an equal amount to one-half of the salary of said office." (2) "That each of said separate and several paragraphs of answers of said defendants sets up an unlawful and illegal agreement and one against public policy in this: That each of said paragraphs sets up that said defendants were to participate in one-half of plaintiff's salary as postmaster, under the Federal Government in the city of Fort Wayne, during Grover Cleveland's administration, or an amount equal to one-half of plaintiff's salary as postmaster, as a consideration for said defendants' procuring for said plaintiff the appointment of postmaster at the city of Fort Wayne, under said Grover Cleveland and through the Congressman of the Twelfth District, William W. McNaghy." (3) "That each of said separate and several paragraphs of answers of said defendants sets up that which is unlawful and void and against public policy in this: That said defendants, because of their efforts on behalf of Grover Cleveland's election as President of the United States, and the election of William F. McNaghy, Congressman to the United States Congress from the Twelfth District of Indiana, and in consideration

for their services in the election of said President and said Congressman, and in consideration that said defendants would procure said president and said congressman to appoint this plaintiff postmaster at the city of Fort Wayne, that said defendants were to participate in said plaintiff's salary, or an amount equal to half his salary as such postmaster."

Appellee contends that the contract between appellee and Moynihan, as disclosed by said answer, is against public policy and void, and his counsel assume in the argument that the contract amounts to an agreement to assign a part of appellee's salary as postmaster, before the salary was earned, and an agreement to pool the salary with the income of the Journal Company. Appellee is well supported by the authorities upon the legal propositions for which he contends. The courts have uniformly refused to enforce agreements to assign the salary of a public officer before the same was earned. We deem it unnecessary to set out the reasons for such refusal, in view of our construction of the agreement set out in appellants' answer of set-off.

This answer discloses, in substance, that appellee Rockhill and said Moynihan were the owners of the capital stock of the Journal Company in equal proportions; that each was contributing all of his time to the publication of a newspaper and the conduct of the other business of the corporation; that appellee was offered the office of postmaster at Fort Wayne, which would require all of his time; that Moynihan agreed to perform the work for their company theretofore performed by both of them, and, in consideration therefor, appellee agreed to pay said Moynihan a sum equal to one-half of his salary as postmaster.

The demurrer admits the facts alleged in the answer to be true. We do not think that counsel

for appellee are warranted in assuming, as they do, that the answer shows an assignment to either an earned or an unearned salary of a public officer, or that it shows a so-called pooling of appellee's salary as postmaster with the income of the Journal Company. The salary is only incidentally referred to in the agreement, and the amount of it merely serves to fix the amount which appellee agreed to pay to Moynihan. If the agreement had been that the Journal Company should have appellee's salary, the same to become a part of the assets of the Journal Company, a wholly different question would be presented for our consideration, but an agreement by appellee to pay Moynihan a sum equal to one-half of his salary did not give Moynihan or the Journal Company any interest in the salary, but left appellee free to draw his salary and use it as he saw fit. *Tron v. Lewis* (1902), 31 Ind. App. 178, 66 N. E. 490. We find nothing in the agreement which even tends to show that said Moynihan or the Journal Company had anything to do with procuring the office of postmaster for appellee, or with procuring the election of the congressman, or the President, or that the salary was to be divided in consideration for any such services. Appellee has set out in his memoranda no reason, in our opinion, why appellants' answer of set-off is not good, and we are of the opinion that the answer is good as a set-off against appellee's complaint, and that the court erred in sustaining the demurrer thereto.

The cause is reversed, with directions to the court below to overrule appellee's demurrer to the answer of set-off, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 113 N. E. 734. Assignment of unearned salary of public officers, validity, notes 5 L. R. A. (N.S.) 567; 9 Cyc 495.

LEACH, GUARDIAN v. WEBB.

[No. 9,512. Filed June 27, 1916. Motion to reinstate overruled October 5, 1916.]

APPEAL.—Judgments Reviewable.—Judgment on Exceptions to Guardian's Report.—A judgment ordering the reform of a guardian's final report in certain particulars, but neither discharging the guardian nor terminating the guardianship, is not a final judgment from which an appeal will lie to the Appellate Court.

From Tipton Circuit Court; *James M. Purvis*, Judge.

James H. Leach, guardian of Floyd Webb, minor, filed his final report, to which Floyd Webb filed exceptions. From a judgment for the exceptor, the guardian appeals. *Appeal dismissed.*

O. H. Mendenhall, for appellant.

Cleon Wade Mount, for appellee.

McNUTT, J.—James H. Leach, as guardian of Floyd Webb, minor, filed his final report in the court below, in which it was shown that his ward had arrived at the age of twenty-one years. To this report said Webb filed exceptions, to which said Leach filed a reply in general denial. The matter was submitted to the court for trial, and upon proper request the court found the facts specially, and stated its conclusions of law thereon in favor of the appellee. The court also rendered the following alleged judgment: "It is therefore ordered, adjudged and decreed, by the court, that said guardian reform his said final report, as set out in the special finding of facts and conclusions of law thereon, and that he pay all costs, and charges accrued on account of the objections filed to said final report, and the trial thereof, taxed at \$. It is also ordered and decreed by the court, that said guardian make and file his amended final report on or before No-

vember 15th, 1915, and that he pay into the hands of the clerk of this court the sum of \$323.20 in cash and turn to the custody of the clerk, one note calling for \$32.50. All of which is finally ordered, adjudged and decreed by the court."

Said Leach excepted to the court's conclusions of law, and also filed his motion for a new trial, which was overruled and excepted to. Appellant in the above form assigns numerous errors in this court, among which are that the court erred in several of its conclusions of law, and also in overruling his motion for a new trial.

We are of the opinion that the judgment rendered by the trial court does not make a final disposition of the guardianship, and therefore it is not such a final judgment from which an appeal will lie to this court; and that this appeal ought to be dismissed. In the case of *Angevine, Admr. v. Ward, Gdn.* (1879), 66 Ind. 460, the guardian submitted to the court, after the ward's death, what purported to be his final report. The administrator of his estate filed exceptions to the guardian's report. The exceptions were not sustained, and the court made an order to that effect, but did not discharge the guardian. The administrator appealed, but the court said: "But we are of the opinion that it was not in any proper sense an order of final settlement of the guardianship, and that it did not, in legal effect, discharge the appellee from such guardianship. By its terms, further duties in regard to his trust were devolved upon the appellee." The appeal was dismissed.

The case of *Pfeiffer v. Crane, Gdn.* (1883), 89 Ind. 485, is very much like the case at bar. The court, after hearing evidence upon exceptions to the guardian's final report, made the following order: "And it is ordered by the court that the reports of

Allen S. Crane, as guardian of Mary A. Pfeiffer and James H. Crane, be rejected, and approval thereof is refused, and said guardian is directed to make and file his report in accordance with the special findings herein.” The court, speaking of the order made in that case, said: “It does not make a final disposition of the guardianship. It would seem, therefore, not to be a final judgment. It substantially rejects a guardian’s report, and directs him to make another report. It would seem, therefore, to be an order made in the progress of the cause, not determining the controversy, and, therefore, interlocutory.” The Supreme Court dismissed the appeal for that reason.

The judgment in the case at bar, as shown herein, shows by its terms that the guardian was not discharged; but he was ordered to reform his final report in accordance with the special finding of facts and conclusions of law and also to make and file his amended final report at a later day.

Under the authorities above cited and cases therein cited, the appeal must be dismissed. See, also, *Mak-Saw-Ba Club v. Coffin* (1907), 169 Ind. 204, 211, 82 N. E. 461.

Appeal dismissed.

NOTE.—Reported in 113 N. E. 311. See also 2 Cyc 586; 3 C. J. 570.

STODOLA v. LOEWY.

[No. 9,044. Filed June 7, 1916.]

From Lake Superior Court; *Joseph H. Conway*, Special Judge.

J. K. Stinson, for appellant.

Moran & Dyer, for appellee.

PER CURIAM.—Judgment affirmed.

HARRIS ET AL. v. ROUTT ET AL.

[No. 9,080. Filed June 28, 1916.]

From Clay Circuit Court; *John M. Rawley*, Judge.

Action between Curtis Harris and others and Dillon Routt and another.

From a judgment for the latter, the former appeals. *Affirmed.**Cary L. Harrell and Walker & Blankenbaker*, for appellants.*Webster V. Moffett and McGregor & Harris*, for appellees.

HOTTEL, P. J.—The questions presented by this appeal are substantially identical with those decided in *Harris v. International Steel & Iron Construction Company* (No. 9,079), ante 64, 112 N. E. 532, decided this term, and on the authority of that decision the judgment here is affirmed.

BRYSON ET AL. v. CROWN OIL COMPANY ET AL.

[No. 9,045. Filed April 20, 1916. Rehearing denied June 29, 1916.]

From Madison Circuit Court; *Charles K. Bagot*, Judge.Action between David A. Bryson and others and the Crown Oil Company and others. From a judgment for the latter, the former appeals. *Affirmed.**Abram Simmons, Frank C. Dailey and Charles G. Dailey*, for appellants.*Robert W. McBride and Blackledge, Wolf & Barnes*, for appellees.

IBACH, C. J.—The facts and issues in this appeal are in substance the same as in the case of *Bryson v. Crown Oil Co.* (No. 22,683) in the Supreme Court, 185 Ind. —, 112 N. E. 1, decided by that court on March 31, 1916; all questions presented in this appeal were decided in that appeal, and upon the authority of that case the judgment is affirmed.

HARRIS ET AL. v. ROGERS ET AL.

[No. 9,078. Filed June 29, 1916.]

From Clay Circuit Court; *John M. Rawley*, Judge.

Action between Curtis Harris and others and Ira Rogers and another.

From a judgment for the latter, the former appeals. *Affirmed.**Carey L. Harrel and Walker & Blankenbaker*, for appellants.*Webster V. Moffett and McGregor & Harris*, for appellee.

McConnell v. Prest-O-Lite Co.—62 Ind. App. 697.

FELT, J.—The facts in this case are substantially the same, and the law questions presented are identical with those decided in *Harris v. International Steel & Iron Construction Company* (No. 9,079), ante 64, 112 N. E. 532, decided by this court this term. On the authority of that decision the judgment in this case is affirmed.

HARRIS ET AL. v. GREER-WILKINSON LUMBER COMPANY.

[No. 9,077. Filed June 29, 1916.]

From Clay Circuit Court; *John M. Rawley*, Judge.

Action between Curtis Harris and others and the Greer-Wilkinson Lumber Company. From a judgment for the latter, the former appeals. *Affirmed*.

Carey L. Harrel and *Walker & Blankenbaker*, for appellants.

Webster V. Moffett and *McGregor & Harris*, for appellee.

HOTTEL, P. J.—The facts presented by the record in this appeal are substantially the same as were presented in *Harris v. International Steel & Iron Construction Company* (No. 9,079), ante 64, 112 N. E. 532, decided this term, and the law as there announced controls the questions here presented. On the authority of that case the judgment below is affirmed.

McCONNELL, ADMINISTRATRIX v. THE PREST-O-LITE COMPANY.

[No. 9,024. Filed June 28, 1916. Rehearing denied October 6, 1916.]

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Action between Emma McConnell, administratrix, and the Prest-O-Lite Company. From a judgment for the latter, the former appeals. *Affirmed*.

Joseph O. Carson, *George W. Galvin* and *Shirts & Fertig*, for appellant.

Korbly & New, *John S. Berryhill* and *Kane & Kane*, for appellee.

IBACH, J.—The questions presented by this appeal have all been decided adversely to appellant in the case of *Prest-O-Lite Company v. Skeel*, 182 Ind. 593, 106 N. E. 365. On the authority of that case the judgment is affirmed.

INDEX

[Note.—The citation *Baltimore, etc., R. Co. v. Duncan*, 161, 164 (2), indicates that the case begins on page 161, the point cited is on page 164, and that such point is numbered 2 in the margin.—Reporter.]

ABSTRACTS OF TITLE—

As evidence, admissibility to show service of process, see EVIDENCE 10, 11; JUDGMENTS 5.

ABUTTING OWNERS—

Liability of street railroad companies to, for adjusting road bed, see EMINENT DOMAIN.

Special damages to, in making public improvements, presumptions, see EVIDENCE 6.

*ACCOUNT—

Interest on, recovery, theory, see INTEREST.

Pleading as to items of, correctness, presumptions, see PLEADING 13, 14.

ACTION—

For actions by or against particular classes of persons, or in reference to the various causes of action, see the specific topics.

1. *Grounds*.—*Illegal Contract*.—An action can not be predicated upon a contract declared void by statute.

Baltimore, etc., R. Co. v. Duncan, 161, 164 (2).

2. *Joinder of Causes*.—While it is a general rule that two separate independent causes of action, one based on tort and the other on contract, can not be joined in the same proceeding, this rule has no application in such a case as the one at bar, wherein a pleading based on a breach of warranty and a pleading based on fraud grew out of the same transaction, and such pleadings may be properly joined in separate paragraphs of the same complaint or answer. Under the provisions of §352 Burns 1914, §347 R. S. 1881, the rule as to joinder of defenses is more liberal and comprehensive, if anything, than as to the joinder of causes of action.

Nave v. Powell, 274, 283 (5).

ADMINISTRATORS—

See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS—

See EVIDENCE.

ADULTERY—

Of wife, right to alimony, see DIVORCE 1.

ADVANCEMENTS—

See DESCENT AND DISTRIBUTION.

ADVERSE POSSESSION—

1. *Acts Constituting*.—Adverse possession which affects the right of the true owner is that which exists and appears on the land itself, and where the occupancy is such as to indicate ownership

ADVERSE POSSESSION—Continued.

and to furnish to the real owner, upon inquiry, information of the occupant's claim of title, and the character and extent of his possession, it is sufficient. *Hitt et al. v. Carr*, 80, 115 (25).

2. *Color of Title.—What Constitutes.*—While as a general rule color of titles arises only from an instrument in writing describing the land claimed, a state of facts, pursuant to which the claimant is in possession, and which facts of themselves show the character and extent of his entry and claim, may sufficiently perform the office of color of title upon which to base a title by adverse possession, not only to the land actually occupied by the claimant, but to the full extent of the claim as thus shown.

Hitt et al. v. Carr, 80, 108 (22).

3. *"Color of Title."*—*"Claim of Title."*—*"Color of title"* is that which has the semblance or appearance of title, either legal or equitable, but which is in fact no title, while *"claim of title"* exists where one enters upon and occupies land with the intent to hold it as his own against the world irrespective of any foundation for such claim.

Hitt et al. v. Carr, 80, 106 (15).

4. *"Color of Title."*—*"Claim of Title."*—A claim of title, without color of title, may ripen into title to the land actually occupied by the claimant, but with color of title his title may be perfected to the whole tract indicated by that which gives the color of title, though he be in actual possession of only a part of such tract, if the part possessed is an integral portion of the whole tract.

Hitt et al. v. Carr, 80, 107 (16).

5. *Color of Title.—Instruments Constituting.*—A forged deed, or a lost deed, the contents of which have been proven, may give color of title.

Hitt et al. v. Carr, 80, 108 (20).

6. *Color of Title.—Instruments Constituting.*—An instrument in writing, or a survey, used by a donor of land or referred to by him in making a parol gift of land, under and in pursuance of which the donee has taken possession, will give color of title, though it does not purport to convey the land to such donee, if it so describes the land as to enable the donee to ascertain therefrom the boundaries and extent thereof.

Hitt et al. v. Carr, 80, 107 (18).

7. *Color of Title.—Knowledge by Holder of Legal Title.*—It is essential to the perfection of title by adverse possession that the holder of the legal title must have actual or constructive notice of the claim of right or title asserted by the one in possession, but it is not essential that he have knowledge of the existence of *"color of title"* in the latter in order that the latter may have the benefit thereof if it in fact exists.

Hitt et al. v. Carr, 80, 107 (17).

8. *Color of Title.—Party Conferring.*—In the absence of a statute requiring it, the grantor or donor of lands, or one from whom it is claimed by descent, may confer color of title without himself having in any kind or semblance of title to the property.

Hitt et al. v. Carr, 80, 108 (19).

9. *Color of Title.—Void deed.*—A deed void on its face, if containing a description sufficient to identify the land, may give color of title as effectually as though it were regular on its face, but void for reasons *dehors* the instrument, since the office of *"color of title"* is merely to define the extent of the land claimed by one asserting title.

Hitt et al. v. Carr, 80, 106 (14).

10. *Evidence.—Acts of Ownership.—Occupancy.—Character of Land.*—The character of real estate claimed by adverse possession is of controlling influence in determining what acts of ownership, use and occupancy will suffice to show possession of the whole tract claimed, and if the possession and other acts of ownership are such as are reasonably adapted to and in keeping with the beneficial use

ADVERSE POSSESSION—Continued.

that may be reasonably made of such lands, and are such as are usually practiced by owners of similar lands in that vicinity and at the time in question, and such possession and acts of ownership are exercised in disregard of all conflicting claims without permission from any one, the inference of actual possession of the whole tract is warranted.

Hitt et al. v. Carr, 80, 114 (24).

11. *Evidence.—Sufficiency.—Color of Title.*—Evidence showing that in 1876 the owner of land bordering on Lake Michigan, believing that the same was of no value, told plaintiff that if she would live on it she could have it, and gave her the deed held by him with the promise to execute and send her a deed later; that plaintiff thereafter returned the deed requesting the owner to execute her a deed, but that no deed was ever made; that plaintiff lived on the property from the date of its presentation to her continuously for more than twenty years, excepting for occasional periods of temporary absence; that she caused buildings to be erected at various places on the land and made attempts to cultivate it, but that it was worthless for cultivation; that she erected a dancing pavilion on the lake front; that her husband used the shore in his fishing business and erected structures necessary in such business; that plaintiff used the land as much as it was possible to do so and from time to time cut and sold small timber growing thereon; that she always asserted ownership to the entire tract to the exclusion of all other claimants, etc., established title by adverse possession in plaintiff to the land in controversy either on the theory that the deed left in her possession by the alleged donor gave her color of title, or that, independent of the question of color of title she had such actual, visible, hostile and uninterrupted possession under claim of ownership as to perfect her title.

Hitt et al. v. Carr, 80, 117 (26).

12. *Evidence.—Sufficiency.*—The evidence was not sufficient to support plaintiff's claim of ownership and title by adverse possession, on the theory that the possession was in plaintiff's husband, because of the mere fact that he drove trespassers from the land, where there was evidence tending to prove all the essential elements of adverse possession in plaintiff and to show that the husband drove trespassers off at her direction.
13. *Extent of Possession.—Findings.—Conclusiveness.*—Where the question of whether plaintiff was in actual possession of all the land claimed was an issuable fact, a finding for plaintiff on that issue, if warranted by the evidence, is conclusive on appeal.

Hitt et al. v. Carr, 80, 114 (23).

14. *Title.—Evidence.—Sufficiency.*—Evidence showing that in 1876, the purchaser of the land in suit looked at it and, being satisfied that it was worthless, told plaintiff that if she would live on it she might have it; that no notary being convenient he wrote off a description and handed his unrecorded deed to plaintiff with a promise to execute a deed to her later; that no deed was ever made, but plaintiff moved on the land, erected buildings at various places thereon and attempted to cultivate it, although it was worthless for cultivation; that she erected a dancing pavilion on the lake front; that her husband used the shore in his fishing business and erected structures necessary in such business; that plaintiff used the land as much as it was possible to do so and from time to time cut and sold small timber growing thereon; that she always asserted ownership to the exclusion of all other claimants and resided thereon for more than twenty years, except for occasional periods of temporary absence, etc., was sufficient to show title by adverse possession to at least a portion of the land in controversy.

Hitt et al. v. Carr, 80, 98 (12).

ADVERSE POSSESSION—Continued.

15. *Title.—Evidence.—Sufficiency.*—Where there was no failure of proof as to any material element to sustain a finding of adverse possession the finding could not be affected on appeal by the fact that some of the evidence as to certain elements was conflicting.

Hitt et al. v. Carr, 80, 103 (13).

AGENCY—

See **PRINCIPAL AND AGENT**.

ALIMONY—

See **DIVORCE**.

AMENDMENT—

See **PLEADING**.

ANNEXATION—

See **MUNICIPAL CORPORATIONS**.

ANSWER—

See **PLEADING**.

Objection to sufficiency of complaint by, waiver, see **APPEAL 6**.

ANTICIPATORY BREACH—

See **CONTRACTS; INSURANCE**.

APPEAL.

- | | |
|--|--|
| I. APPELLATE JURISDICTION, 1, 2. | VIII. ASSIGNMENT OF ERRORS, 28-38 |
| II. DECISIONS REVIEWABLE, 3. | IX. BRIEFS, 39-53. |
| III. RIGHT OF REVIEW, 4. | X. DISMISSAL, 54, 55. |
| IV. PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW. | XI. HEARING AND REHEARING, 56. |
| (a) OBJECTIONS AND MOTIONS, AND RULINGS THEREON, 5-8. | XII. REVIEW. |
| (b) EXCEPTIONS, 9-11. | (a) SCOPE AND EXTENT, 57-61. |
| (c) MOTIONS FOR NEW TRIAL, 12-16. | (b) PRESUMPTIONS, 62-66. |
| V. PARTIES, 17, 18. | (c) QUESTIONS OF FACT, VERDICTS AND FINDINGS, 67-76. |
| VI. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE, 19-23. | (d) HARMLESS ERROR, 77-83. |
| VII. RECORD AND PROCEEDINGS, NOT IN RECORD, 24-27. | (e) DECISIONS OF INTERMEDIATE COURTS, 84. |
| | (f) SUBSEQUENT APPEALS, 85, 86. |
| | XIII. DETERMINATION AND DISPOSITION OF CAUSE. |
| | (a) REVERSAL, 87, 88. |

From board of commissioners, see **COUNTIES**.

I. APPELLATE JURISDICTION.

1. *Moot Question.—Suit to Restrain Act Done.*—Because of a dispute as to water rates, defendant threatened to cut off the water supply for plaintiff's automatic sprinkler system, a fire protection device, and suit was brought to restrain such action. After the filing of the suit and pending appeal, the defendants did cut off such water supply, and then, on the appeal, argued that only a moot question was presented. *Held*, that the question did not become moot, as the court had ample power to compel the defendant to furnish plaintiff water, and could not be deprived of jurisdiction by the commission of the wrongful act complained of after the filing of the suit and pending appeal.

Terre Haute Paper Co. v. Terre Haute Water Works, 263, 268 (1).

APPEAL—Continued.

2. *Objections to.—When not Waived.*—Appellees did not waive the question as to jurisdiction by filing a motion for time in which to file their brief where the court's record shows that the motion to dismiss was filed before the petition for time and such petition sets out that all motions to dismiss have already been filed.

Gladieux v. Johns et al., 338, 341 (2)

II. DECISIONS REVIEWABLE.

3. *Judgment on Exceptions to Guardian's Report.*—A judgment ordering the reform of a guardian's final report in certain particulars, but neither discharging the guardian nor terminating the guardianship, is not a final judgment from which appeal will lie to the Appellate Court.

Leach v. Webb, 693.

III. RIGHT OF REVIEW.

4. *Dismissal.—Accepting Benefits of Judgment.*—Where a judgment quieted title in favor of appellee subject to a lien for the support of appellant's codefendant and cancelled a deed from the codefendant to the appellant, in which the codefendant had reserved a life estate, an agreement for compensation to appellant by the appellee for the support of the codefendant, and the acceptance by appellant of payments under the agreement, came within the spirit of §671 Burns 1914, §632 R. S. 1881, providing that the party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon, and necessitated a dismissal of the appeal.

Evans v. SeEVERS, 20.

IV. PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW.**(A) OBJECTIONS AND MOTIONS, AND RULINGS THEREON.****See TRIAL.**

5. *Necessity of Objections.—Waiver of.—Presence of Judge.—Conduct of Trial.*—While the better practice requires the visible presence of a presiding judge at all times during the actual progress of the trial, yet the fact that the judge absented himself temporarily from the court room on business connected with the trial on two occasions during the argument to the jury is not available error where there were no objections made at the time either to his absence or to argument of counsel and where the record fails to show that such absence was in any way prejudicial to the complaining party, as it is the rule in this state that misconduct of any one connected with the trial not affecting the jurisdiction of the court when acquiesced in without objection is waived.

Merchants Nat. Bank v. Nees, 290, 298 (7).

6. *Objection to Sufficiency of Complaint.—Waiver.—Statute.*—Since the amendment of §348 Burns 1908, §343 R. S. 1881, by Acts 1911 p. 415, the objection that the complaint does not state facts sufficient to constitute a cause of action is waived unless taken by answer or demurrer.

Toledo, etc., R. Co. v. Milner, 208, 212 (1).

7. *Review.—Errors Assignable on Appeal.—When Waived.—Statute.*—Under §§344, 348 Burns 1914, Acts 1911 p. 415, providing that, if the objection that the complaint does not state facts sufficient to constitute a cause of action is not taken by answer or demurrer, such objection shall be deemed to have been waived, the question of the sufficiency of the complaint to state a cause of action cannot be raised for the first time on appeal.

Indiana Life Endowment Co., v. Carnithan, 567, 574 (2).

APPEAL—Continued.

8. *Review.—Sufficiency of Complaint.*—Under the provision of §348 Burns 1914, Acts 1911, p. 415, if no objection to a complaint is taken by demurrer or answer, defendant is deemed to have waived all objections except the jurisdiction of the court over the subject of the action, and he can not, on appeal, for the first time, raise the question that the complaint does not state facts sufficient to constitute a cause of action. *Hollander v. Fletcher*, 149, 150 (1).

(B) EXCEPTIONS.

9. *To Conclusions of Law.—Questions Reviewable.*—Where findings and conclusions of law were announced by the trial court, and no exception thereto was taken until several days later, no question was presented on appeal by an assignment of error in the conclusions of law, since under §656 Burns 1914, §626 R. S. 1881, exceptions must be taken at the time the decision is made in order to save any question for review.

Millgrove School Tp. v. Peck-Hammond Co., 2, (1).

10. *Review.—Exception to Judgment.*—An exception to a judgment presents no question for review by the appellate tribunal, since, under the proper practice, the exception should be taken to the ruling of the court upon which the judgment is determined.

Shull v. Dunten, 602, 606 (4).

11. *Review.—Judgment.—Entry.*—Where the record, on appeal, shows an objection and an exception noted at the conclusion of the trial court's entry of the judgment, and such entry is preceded by the court's ruling on the motion for judgment on the interrogatories, the exception so noted is to the judgment and does not apply to the ruling on the motion.

Shull v. Dunten, 602, 607 (5).

(C) MOTIONS FOR NEW TRIAL.

12. *Presenting Grounds of Review.—Specification of Grounds.*—In assigning as a ground for a new trial, where the cause has been tried by the court, that the "finding" is not sustained by the evidence, the use of the word "finding" is equivalent to the word "decision" used in the statute (§585, cl. 6; Burns 1914, §559 R. S. 1881), so that such specification of a ground for a new trial properly presents for review the question of the sufficiency of the evidence.

Hillel v. Julius H. Buettner Furn., etc., Co., 481, 483 (2).

13. *Presenting Questions for Review.—Peremptory Instruction.*—The giving of a peremptory instruction is not the subject of an independent assignment of error, but is properly assigned as ground for a new trial.

Ault v. Clark, 55, 58 (1).

14. *Questions Presented.*—Alleged error in overruling a motion for new trial presents no question where it appears that the motion was not filed in time.

Paxton-Eckman Chem. Co. v. Mundell, 45, 55 (7).

15. *Review.—Reservation of Exceptions and Errors.*—The refusal of the trial court to allow the proper party to open and close the argument was an error occurring during the trial and should, under §585, cl. 5, Burns 1914, §559 R. S. 1881, be presented in a motion for a new trial to present any question for review on appeal.

Williams v. Lowe, 357, 361 (4).

16. *Review.—Time for Filing.—Statute.*—No question is presented for review by an assignment of error challenging the action of the trial court in overruling a motion for a new trial where the record shows that such motion was not filed within thirty days from the rendition of the verdict as required by §587 Burns 1914, Acts 1913, p. 848.

Shull v. Dunten, 602, 604 (2).

APPEAL—Continued.**V. PARTIES.**

17. *Dismissal of Appeal.*—Where the holder of a mechanic's lien obtained judgment in the lower court on a cross-complaint in an action for partition, but was not made a party to the appeal by the assignment of errors in appellant's brief, the appeal will be dismissed, as the appellate court has no power to disturb a judgment unless all in whose favor it was rendered are parties to the appeal. *Gladieux v. Johns et al.*, 338, 341 (1).
18. *Procedure.—Necessary Parties.*—In a suit to foreclose a mortgage, even though it appeared that the plaintiffs filed an admission that one of the defendant mortgagors was of unsound mind when the mortgage was executed and not liable, and there was a judgment for costs in favor of defendants, such insane defendant was interested in supporting the judgment within the meaning of §674 Burns 1914, Acts 1899 p. 5, concerning notice of appeal, and a necessary party to a vacation appeal, and failure to give her notice or make her a party or to furnish a bond inuring to her benefit necessitates a dismissal of the appeal. *Crouch v. Shantz*, 476, 479 (2).

VI. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

19. *Appeal Bond.—Execution.—Presumption.*—An appeal will not be dismissed because the bond, which was approved by the county auditor, was signed by the town attorney instead of the town trustees, where the bond was considered properly executed by all the parties and the objection urged is presented for the first time in appellant's brief, as, under the facts in the case, it will be presumed that the town officers did their duty and complied with the provisions of the law authorizing appeals and for the further reason that, if the bond was irregularly executed, the matter should have been presented in the trial court where any defect might have been corrected by filing a new bond in accordance with §1354 Burns 1914, §1283 R. S. 1881. *Patterson v. Town of Fort Branch*, 333, 337 (3).
20. *Jurisdiction over Parties.—Cross-Errors.—Appearance.*—In a suit commenced by a number of property owners to enjoin the collection of assessments on account of the construction of a sewer, a judgment was rendered in favor of part of the plaintiffs and against some of them on the ground that by their acts they were estopped from complaining against the collection of such assessments. The latter appealed and the other plaintiffs filed a confession of error. The contractor, one of the appellees, assigned cross-errors challenging the correctness of the conclusions of law of the trial court upon which is based the judgment in favor of the appellee plaintiffs, but no notice of such assignment was served on appellees. The reply brief of appellants attacked not only such cross-assignment of errors as affected them, but also argued against those cross-errors attacking the conclusions of law which affected the appellee plaintiffs alone. The appellate court reversed the judgment and remanded the case, with directions as to costs which affected appellees, and thereupon they filed a petition for rehearing setting up that the appellate court had no jurisdiction over them in reference to the cross-errors. Held that, as the argument of the reply brief to cross-appellants' assignments of cross-errors was both for the purpose of sustaining the conclusions of law favorable to appellee plaintiffs as well as to attack such conclusions of law as were adverse to appellants, such brief constituted an appearance for appellee plaintiffs and gave the appellate tribunal jurisdiction to enter the mandate it did. *Almeier v. Adams*, 219, 259 (15).

APPEAL—Continued.

21. *Notice of Appeal.—Service on Attorney.*—Under §681 Burns 1914, §640 R. S. 1881, providing that notice of appeal may be served on the attorney of the adverse party, service of the notice on appellee's attorney in the trial court is invalid and ineffectual to perfect the appeal, where appellant is notified at the time of the service that such attorney no longer represents the appellee.

Walker v. Johnson, 550, 553 (2).

22. *Notice of Appeal.—Service on Attorney.—Presumption.*—Where an appeal is regularly taken within the statutory period by persons not asserting any legal disabilities, the appellant, in serving notice of the appeal, may presume, until he acquires knowledge to the contrary, that the opposing party's attorney of record in the trial court also represents him on appeal.

Walker v. Johnson, 550, 553, 554 (1).

23. *Time for Perfecting.—Extension of Time.—Showing Good Cause.—Statute.*—Under §2977 Burns 1914, §2454 R. S. 1881, and §2978 Burns 1914, Acts 1913 p. 65, providing that any person considering himself aggrieved by a decision of the circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, may appeal by filing a bond within thirty days from the rendition of the decision complained of, unless, for good cause shown, the court to which the appeal is prayed shall direct such appeal to be granted, upon the filing of a bond, within 180 days after such decision, an appellant will not be granted additional time beyond the thirty-day period in which to perfect the appeal unless he complies with the statute by showing good cause therefor.

Willis v. Ferguson, 563, 565 (1).

VII. RECORD AND PROCEEDINGS NOT IN RECORD.

24. *Review.—Motion for New Trial.—Transcript of Evidence.—Necessity.*—Where consideration of the causes assigned for a new trial, that are properly assignable under the statute, require an examination of the evidence and the evidence is not in the record, no question is presented for review, on appeal, by an assignment of error challenging the action of the trial court in overruling the motion for a new trial.
25. *Review.—Answer to Special Interrogatories.*—Where an interrogatory is improperly submitted to the jury its answer cannot be taken into account for any purpose since the appellate court will not consider anything which is improperly in the record in reaching its conclusions.

Shull v. Dunten, 602, 604 (1).

Terre Haute, etc., Traction Co. v. Hunter, 399, 418 (9).

26. *Time of Perfecting.—Administrator.—Statute.*—While an administrator, under §2980 Burns 1914, §2457 R. S. 1881, is not required to file an appeal bond in an appeal from a decision growing out of any matter connected with a decedent's estate, yet he must comply with the requirements of the statute (§2978 Burns 1914, Acts 1913 p. 65) in so far as the time for perfecting an appeal is concerned, and, in the absence of a showing by appellant for additional time in which to perfect the appeal, it must be dismissed where the transcript is not filed within 120 days after the decision complained of is made.

Willis v. Ferguson, 555, 566 (2).

27. *Review.*—Where counsel for the defendant, in the opening statement of facts to the jury, said that there was no question of contributory negligence in the issues, although such a defense was subsequently interposed, such statement, not having been presented in any way by the record can not be considered on appeal, as the cause must be tried by the record alone.

City of Indianapolis v. Pell, 191, 195 (4).

APPEAL—Continued.

VIII. ASSIGNMENT OF ERRORS

Overruling demurrer as record disclosing no memorandum, effect, see PLEADING 12.

Conclusions, not amounting to a finding, see PARTNERSHIP 1.

An assignment that the decision "is not sustained by the evidence" is in effect equivalent to an assignment that the decision is not sustained by sufficient evidence.

Hillel v. Julius H. Buettner Furn., etc., Co., 481, 483 (3).

28. *Identifying Questions Presented.*—The assignment of error in the appellate court must identify and present for the determination of the court the same question presented and passed upon by the trial court.

Warner v. Reed, 544, 548 (2).

29. *Joint Assignment of Error.—Effect.*—A joint assignment of error must be good as to all who join therein or it will be good as to none.

Helms v. Cook, 629, 635 (4).

30. *Joint Rulings and Exceptions.—Separate Assignment of Error.*—Coparties may not sever their pleadings, or motions in the trial court, and obtain separate rulings thereon and separate exceptions thereto, and then on appeal obtain a review of such rulings in the appellate tribunal by a joint assignment of error, and vice versa and where the motion for a new trial, the ruling thereon and the exception thereto are joint, and the appellants in their brief elect to rely on a separate assignment of error, it is impossible for the court by looking to such motion, the ruling thereon or the exception thereto, to determine whether the question passed on by the trial court is identical with that presented by the separate assignment of error, and such assignment, therefore, presents no question for the consideration of the appellate court.

Helms v. Cook, 629, 632 (2).

31. *Matters Assignable.*—Neither the assignment that the court erred in sustaining defendant's plea in abatement, nor that it erred in rendering judgment abating an attachment proceeding is a proper independent assignment of error, and no question is presented for review by either of such assignments.

Hopkins v. Matters, 676, 678 (3).

32. *Motion for New Trial.—Review.*—Where the motion for a new trial, the ruling thereon and the exception thereto are joint and appellants in their brief elect to rely on a separate assignment of error, the appellate court will not go behind the motion on which the ruling complained of is based and examine the several rulings and exceptions on which such motion is predicated to determine if all appellants were not affected alike by such motion and thereby ascertain that the question presented, and decided below was identical with that presented on appeal, but the appellate court will look only to the pleadings or motion on which the ruling assigned as error is based, the ruling itself and the exception thereto.

Helms v. Cook, 629, 633 (3).

33. *Perfection of Appeal.—Failure to Amend.*—Where an appellant died pending submission of the cause and his heirs were substituted as appellants on notice served on appellees, the appeal will not be dismissed because of the failure to formally amend the assignment of errors to correspond with the order of substitution.

Osterhaus v. Creviston, 382, 386 (1).

34. *Presentation of Error.*—The first step necessary to properly present such errors as are relied on for reversal is a proper assignment thereof on the transcript filed in the appellate court.

Kaiser v. Wittekindt, 171, 174 (2).

APPEAL—Continued.

35. *Review.—Judgment.*—An assignment of error that the trial court erred in rendering judgment for or against a party presents no question for review. *Shull v. Dunten*, 602, 605 (3).
36. *Review.—Memoranda of Demurrer.*—No question is presented for review by an assignment of error predicated on the action of the trial court in overruling appellant's demurrers where there is a failure to set forth in the briefs the memoranda filed with the demurrers. *McGee v. Stockton*, 555, 556 (1).
37. *Review.—Requisites.*—The assignment of error, to be sufficient as to any particular error attempted to be presented for review, must present to the appellate tribunal the precise question which was presented to the lower court for its decision. *Helms v. Cook*, 629, 631 (1).
38. *Review.—Specification of Errors.*—Where appellant's first and second assigned errors set forth that the trial court erred in sustaining appellee's demurrers to the first and second paragraphs of answer "to appellee's complaint" no question is presented the appellate court for review by such assigned errors, because the record does not disclose any ruling to which such assignments are applicable, since the first paragraph of answer was addressed to the first paragraph of complaint and the second paragraph of answer was addressed to the second paragraph of complaint. *Williams v. Lowe*, 357, 360 (1).

IX. BRIEFS.

39. *Appellee's Failure to File.*—Where the appellee fails to file briefs the Supreme and Appellate Courts, may in their discretion, deem such failure as a confession of the errors assigned by appellant. *Keeley v. Bradford*, 683, 684 (1).
40. *Appellee's Failure to File.—When Confession of Error.*—The appellee's failure to file briefs will not be deemed a confession of error when no error is, in fact, presented by appellants' briefs. *Keeley v. Bradford*, 683, 685 (3).
41. *Assignment of Errors.—Waiver of Errors.*—Such of the assigned errors as are not presented by the appellant's brief will be deemed to have been waived. *Lake Erie, etc., R. Co. v. McConkey*, 447, 449 (1).
42. *Grounds of Review.—Ruling on Motion for New Trial.*—Where the only reference to the ruling on the motion for a new trial in appellant's points and authorities is a statement that "there were rulings on certain instructions referred to in the new trial as to the time when a sale in the case was effected and under that head the following authorities are cited," followed by a statement of two separate propositions of law and citation of authorities in support thereof, presents no question on the ruling on such motion. *Nave v. Powell*, 274, 277 (2).
43. *Insufficiency.—Dismissal.*—Where appellant's briefs do not set out enough of the record to present the questions relied on for reversal they fail to comply with Rule 22, cl. 5, of the Supreme and Appellate Courts, and the appeal will be dismissed. *Keeley v. Bradford*, 683, 685 (4).
44. *Insufficiency.*—Appellant's brief, containing no statement of the errors assigned or relied on for reversal, no statement of the record showing any error or exception relied on, and no statement of the issues or decision, wholly failed to comply with Rule 22, and no question was presented thereby. *Joseph v. Horodesky*, 1.

APPEAL—Continued.

45. *Presentation of Error.—Review.*—Where the "Points and Authorities" in appellant's brief present no question of conflict between the answers to special interrogatories and the general verdict nor any question as to error in overruling the motion for a new trial, except the giving and refusal of certain instructions, the court will consider no other which might arise under the overruling of the motion. *Terre Haute, etc., Traction Co. v. Hunter*, 399, 419 (11).
46. *Questions Presented.*—Where appellant's brief fails to comply with Rule 22, clause 5, of the Supreme and Appellate Courts requiring "a concise statement of so much of the record as presents every error and exception relied on," but does set out the motion for a new trial, containing the grounds assigned therefor, and under the "Points and Authorities" the brief states several abstract propositions of law without attempting to apply them, as the rule of the court provides, to any particular ruling of the trial court, except to state that the decision of the court is not sustained by sufficient evidence, the sufficiency of the evidence is the only question presented for consideration. *Robinson v. Horner*, 456, 458 (1).
47. *Reference to Assignment of Error.—Specification.*—Where appellant, in his brief, fails to make specific reference to any assigned error and makes no attempt to apply his propositions of law to any assigned error, except in one instance, the other assigned errors are waived. *Nave v. Powell*, 274, 277 (1).
48. *Requisites in General.*—The brief must indicate such of the assigned errors as are relied on for reversal as provided in Rule 22, cl. 4, of the Supreme and Appellate Courts, and should contain enough of the record and references thereto to present the ruling upon which each respective error relied on for reversal is predicated, and, where several errors are relied on, the requirement of the rules of the court is not met by a statement in appellant's brief of general propositions of law and a citation of authorities thereunder unless such brief indicates the error to which appellant seeks to apply his proposition of law and authorities. *Kaiser v. Wittekindt*, 171, 174 (3).
49. *Review.—Specification of Errors.*—Where appellant's brief, in its points and authorities, states several propositions of law, none of which are applied to any particular ruling of the trial court or to any assigned error, there is a failure to comply with the rules of the Supreme and Appellate Courts and no question is presented on appeal. *Warner v. Reed*, 544, 547 (1).
50. *Review.—Specifications of Error.*—The court is warranted in refusing to consider instructions where the criticism to the giving or refusing to give such instructions is very general and by abstract propositions of law. *Merchants Nat. Bank v. Nees*, 290, 296 (2).
51. *Specification of Errors.*—Under a rule of court that the appellant's brief shall contain a concise statement of so much of the record as fully presents every exception and error relied upon, failure to set out a motion for change of venue from the judge, the demurrer and memorandum, and a motion for a new trial, or the substance of either, will amount to a waiver, on appeal, of such assignments of error. *Graves v. Kelly*, 164, 166 (1).
52. *Specifications of Error.*—Where appellant's brief, in its points and authorities, fails to direct any proposition to the overruling of the motion in arrest of judgment and the same is not otherwise discussed, no question as to the alleged error is presented to the court for its consideration. *Merchants Nat. Bank v. Nees*, 290, 297 (4).

APPEAL—Continued.

53. *Waiver of Assigned Errors.*—Such assigned errors as are not mentioned or referred to in the points and authorities in appellant's brief are waived.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 531 (1).

X. DISMISSAL.

54. *By Court on Own Motion.*—The appellate court will dismiss a cause on its own motion where the parties necessary to a complete determination of the action are not brought into court.

Gladieux v. Johns, 338, 342 (3).

55. *Notice of Appeal.—Effect of Failure to Give.*—Under Rule 36 of the Supreme and Appellate Courts, a vacation appeal will be dismissed when the cause has been on the docket for ninety days or more without an appearance by the appellee where there has been no effort to perfect the appeal nor any steps taken to bring the appellee into court further than to serve him with an invalid and ineffectual notice of appeal.

Walker v. Johnson, 550, 554 (3).

XI. HEARING AND REHEARING.

56. *Scope.*—Where appellant's brief in the original appeal did not contend that an answer held not good as a plea of fraud was sufficient as an answer of failure of consideration, such question can not be presented for the first time in the petition for a rehearing.

Merchants Nat. Bank v. Nees, 290, 310 (18).

XII. REVIEW.**(A) SCOPE AND EXTENT.**

57. *Evidence.*—On appeal, the error urged by appellant being the action of the trial court in giving an instruction which took the question of contributory negligence away from the jury, the court can consider only the evidence that tends to show contributory negligence, as it is never the province of the court to weigh conflicting evidence.

City of Indianapolis v. Pell, 191, 194 (1).

58. *Moot Question.*—Where an injunction was sought, but pending an appeal from a judgment for defendant the acts complained of had ceased, the question of whether the injunction should be granted became a moot question, not to be further considered.

Miller v. Gates, 37, 41 (2).

59. *Motion for Judgment on Interrogatories.*—Where, on appeal, the error relied on for reversal is the failure of the trial court to render judgment on the answers to interrogatories, the scope of the review is limited to the complaint, answer, the general verdict, and the interrogatories and the answers thereto.

Harker v. Gruhl, 177, 180 (1).

60. *Peremptory Instruction.—Reasons for Giving.*—Where the giving of a peremptory instruction was proper, the reasons of the court for its giving, set forth therein, were immaterial and did not affect it.

Ault v. Clark, 55, 64 (8).

61. *Rulings on Evidence.—Objections.*—On the overruling of an objection to evidence by the trial court, only the grounds of objection presented to the trial court will be considered on appeal; but if the objection is sustained or the evidence excluded, the ruling will be sustained on appeal unless the appellant shows it was wrong on any theory, and the appellee may avail himself of any valid objection to the testimony as offered.

Hill et al. v. Carr, 80, 93 (6).

APPEAL—Continued.

(B) PRESUMPTIONS.

As to authority of attorney to file brief, see ATTORNEY AND CLIENT.

62. *Burden of Showing Error.*—On appeal the burden is on the appealing party to present to the court the errors relied upon for reversal. *Kaiser v. Wittekindt*, 171, 174 (1).

63. *Burden of Showing Error.*—The appellate tribunal will presume that the judgment of the trial court is correct, and on appeal the burden is on the appellant to properly present error which will entitle him to a reversal. *Keeley v. Bradford*, 683, 684 (2).

64. *Evidence.—Sufficiency.*—The court, on appeal, is bound to view the evidence in the light most favorable to the party successful below in considering the question of the sufficiency of the evidence to sustain the verdict. *Smith v. Fiscus*, 156, 161 (4).

65. *Motion for Judgment on Interrogatories.—General Verdict.*—In determining whether error was committed in overruling the motion for judgment on the answers to interrogatories, the court will assume in favor of the general verdict that every supposable fact legally admissible under the issues was proven in support of such verdict. *Lake Erie, etc., R. Co. v. McConkey*, 447, 450 (3).

66. *Verdict.—Evidence.—Sufficiency.*—In determining, on appeal, the sufficiency of the evidence to support a general verdict for the plaintiff, the court must look to the evidence most favorable to him. *Indiana Life Endowment Co. v. Carnahan*, 567, 576 (3).

(C) QUESTIONS OF FACT, VERDICTS AND FINDINGS.

67. *Conflicting Evidence.*—It is not the province of the court to weigh conflicting evidence. *Koehler v. Haller*, 8, 14 (4).

68. *Conflicting Evidence.*—Where the jury's verdict is supported by some evidence on every material fact involved, the appellate tribunal will not weigh conflicting testimony.

Pence v. Pence, 679, 682 (1).

69. *Conflicting Evidence.*—While §698 Burns 1914, Acts 1903 p. 341 requires the Supreme and Appellate Courts to consider and weigh the evidence, if required by the assignment of errors, yet, where the evidence is in part oral and there is a conflict therein, it will not be weighed by the reviewing court.

Robinson v. Horner, 456, 459 (2).

70. *Evidence.—Sufficiency.*—Where there was some evidence to support the verdict, it could not be disturbed on the ground of insufficient evidence, although the evidence was conflicting in some respects. *Indiana Quarries Co. v. Smallwood*, 33, 36 (4).

71. *Partition by Parol.—Conflict of Evidence.*—Where there is a conflict in the oral evidence as to the effect and extent of a parol agreement for partition the decision of the trial court upon such question is final, and it is not reviewable upon appeal.

Murray v. Murray, 132, 142 (1).

72. *Sufficiency of Evidence.*—Where appellants, who were plaintiffs below, seek a reversal of a decision of the trial court on the ground that such decision was not sustained by sufficient evidence, to entitle appellants to such reversal, the burden is upon them to show that there was undisputed evidence before the trial court in support of every element essential to the cause of action stated in the complaint, and that such evidence as to each of such elements was susceptible to but one conclusion, that is, that such element had been proven. *Kaiser v. Wittekindt*, 171, 175 (4).

APPEAL—Continued.

73. *Sufficiency of Evidence.*—Where there is any evidence fairly tending to support each of the elements necessary to sustain the decision of the trial court, the case will not be reversed for insufficiency of the evidence.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 534 (2).

74. *Sufficiency of Evidence to Support Verdict.*—Where there was a general verdict for plaintiffs, who were interstate shippers, the complaint averred that the defendant, a common carrier, had been negligent in delaying the shipment of a consignment of live stock, such delay resulting in loss to plaintiffs, and the defendants set up as a defense that the consignment had been shipped under a special contract limiting the liability of the carrier, such contract providing for the lower of two freight rates, such rate having been promulgated in compliance with the provisions of the federal interstate commerce law. Defendants also answered that plaintiffs had failed to present their verified claims for damages within the time stipulated in the contract. There was evidence tending to prove, though not conclusively, that plaintiffs were compelled to sign the special contract set up as a defense in order to secure the shipment of their freight; that defendant's agent would not move the cars until such contract was signed; and that the plaintiffs were not given the right to make their option as to which of the two published rates they would ship under. *Held*, that, as the general verdict finds every material fact in favor of the plaintiffs, and there is some evidence from which the inferences necessary to support the verdict might reasonably have been drawn, the verdict will not be disturbed on the ground that it is not sustained by the evidence, although other and different inferences of fact might reasonably have been drawn therefrom. *Toledo, etc., R. Co. v. Milner*, 208, 218 (7).

75. *Verdict.—Evidence.—Sufficiency.*—Where, in an action for damages predicated on an alleged repudiation of a contract of insurance by the insurer, the evidence shows that the assured, the plaintiff below, elected, at the time of such alleged repudiation, to treat the contract as still in force for the recovery of benefits thereunder, a verdict for the plaintiff is not sustained by sufficient evidence. *Indiana Life Endowment Co. v. Carnithan*, 567, 585 (11).

76. *Verdict.—Conclusiveness.*—Although the evidence is conflicting, if there is no failure of evidence, a verdict based thereon is conclusive, since the court on appeal cannot weigh or ignore evidence.

Hitt et al. v. Carr, 80, 124 (34).

(D) HARMLESS ERROR.

77. *Admissibility of Evidence.*—Where, in an action for goods sold and delivered, there was filed with the complaint, as an exhibit, what purported to be a duplicate of the order for the goods, the error, if any, in admitting the duplicate in evidence without proof of its execution was cured by the admission in defendant's deposition that the exhibit was a correct copy of the order and by the introduction of the original order.

Coca Cola Bottling Co. v. International Filler Co., 421, 423 (1).

78. *Demurrer to Answer.*—The sustaining of a demurrer to a third paragraph of answer, which was merely an argumentative denial, was harmless in view of the record showing an answer in general denial. *Harris v. International, etc., Constr. Co.*, 64, 72 (3).

79. *Overruling Demurrer.*—Where, in an action on notes the execution of which was admitted, the defendants pleaded two paragraphs of answer, one based on a breach of the warranty and the other based on fraud, the latter being held insufficient, and there was a

APPEAL—Continued.

verdict for the defendants, the overruling of the demurrer to the bad paragraph of answer can not be regarded as harmless, as there was nothing to show on which paragraph of answer the verdict of the jury was based.

Merchants Nat. Bank v. Nees, 290, 306 (13).

80. *Refusal of Instruction.*—In an action against the lessee of a coal mine for the death of an employe, the error, if any, of the trial court in refusing to give an instruction that the jury might consider the interrogatories either before or after they had agreed on the general verdict was harmless, where the interrogatories called for facts concerning but a single branch of the case and the answers were substantially in harmony with the facts as claimed by the defendant.

Deep Vein Coal Co. v. Rainey, 608, 628 (14).

81. *Ruling on Demurrer.*—Where it appeared that the facts found and conclusions of law stated rested upon a good paragraph of complaint, the action of the trial court in overruling the demurrer to another paragraph was harmless even if erroneous.

Harris v. International, etc., Constr. Co., 64, 66 (1).

82. *Ruling on Motion to Dismiss.*—It was not error for the trial court to overrule a motion to dismiss as to two of the defendants named in the original complaint when, before the filing of the motion, an amended complaint was filed which did not make such defendants parties.

Hopkins v. Matters, 676, 678 (2).

83. *Ruling on Pleadings.*—Error, if any, predicated on the action of the trial court in overruling a motion to require plaintiff to elect to go to trial upon either the first and third paragraphs of his complaint, or upon the second paragraph, was rendered harmless by plaintiff's dismissal of the first and second paragraphs of his complaint before the submission of the case to the jury.

Indiana Life Endowment Co. v. Carnithan, 567, 574 (1).

(E) DECISIONS OF INTERMEDIATE COURTS.

84. *Defective Transcript.*—In a proceeding to annex land to a town, an appeal from the finding of the board of county commissioners was taken by the petitioners, who filed an appeal bond with the county auditor who failed to properly certify a transcript of the proceedings with the clerk of the circuit court, but, in the court below, where defects in the transcript might have been urged on motion of either party, there was no objection made to its insufficiency and a trial was had on the merits of the cause with the full appearance of all the parties. *Held* that, under the facts in the case, the failure of the auditor to properly certify the transcript is not ground for reversal, especially as there had been no objection made to the form of the transcript until an appeal was taken to the appellate court.

Patterson v. Town of Ft. Branch, 333, 336 (2).

(F) SUBSEQUENT APPEALS.

85. *Effect of Decision in Prior Appeal.*—"Law of the Case."—Where, on a prior appeal of a cause, the decision of the court determined the construction of a written contract of warranty of a stallion and decided that the remedy provided therein was exclusive and must be so treated in the consideration of any pleading based thereon or involving the construction thereof, such decision is the law of the case in so far as any question concerning the construction of such contract of warranty, or any pleading based thereon, is concerned.

Nave v. Powell, 274, 282 (4).

APPEAL—Continued.

86. *Effect of Decision on Prior Appeal.*—"Law of the Case."—Where no substantial changes are made in pleadings by amendment thereto, the only amendment to the complaint being as to the amount of attorney's fees, the decision in a prior appeal, in so far as the pleadings are concerned, must be considered as the law of the case, but this is not true, however, if the theory of the pleading or any material averment thereof is changed by amendment so as to present an essentially different question of law.

Nave v. Powell, 274, 279 (3).

XIII. DETERMINATION AND DISPOSITION OF CAUSE.**(A) REVERSAL.**

87. *Insufficiency of Evidence.—Burden of Proof.*—Where, in an action for damages, it was alleged in the complaint that defendants contracted with the plaintiffs to furnish them a specified number of half beer barrels of the standard gauge and measurement as required by the United States government, and that the half barrels as furnished were larger than the regulation size resulting in damage to the plaintiff by reason of the excess beer placed therein, expense of recoopering, etc., and there was no evidence of any government law fixing any standard gauge for half barrels, nor was there any conclusive evidence that the half barrels furnished did not meet the contract requirement as to size, or that such half barrels holding an excess quantity were identified as those furnished by defendants, *held*, that appellant has not sustained his burden of showing that the decision of the trial court for the defendant was not sustained by sufficient evidence.

Kaiser v. Wittekindt, 171, 176 (5).

88. *Ruling on Demurrer.—When Grounds.*—Under the provisions of §350 Burns 1914, §345 R. S. 1881, no objection taken by demurrer, and overruled, is sufficient to reverse the judgment if it appears from the whole record that the merits of the cause have been fairly determined.

Brown v. Young, 364, 375 (6).

APPELLATE COURT—

See APPEAL; TRIAL.

APPEARANCE—

On appeal, brief as constituting, see APPEAL 20.

"ARGUMENT"—

Usage of, for memoranda, effect, see PLEADING 11.

ARGUMENT OF COUNSEL—

Refusal of proper party to open and close, how presented for review, see APPEAL 15.

ASSIGNMENT OF ERRORS—

See APPEAL.

ATTORNEY AND CLIENT—

Notice of appeal, service on attorney, when ineffectual, see APPEAL 21, 22.

Fees in divorce cases, allowance, see DIVORCE 2; in partition proceedings, see PARTITION 1.

ATTORNEY AND CLIENT—Continued.

Authority of Attorney.—Presumption.—A member of the firm of attorneys which represented all party plaintiffs below, and who filed the confession of error on behalf of appellee plaintiffs, made an affidavit in support of the petition for rehearing and the motion to modify the appellate court's mandate, in which affidavit he set up that his firm took no part in the prosecution of the appeal after the filing of such confession of errors, but did not state that the attorneys who filed the reply brief in behalf of appellees did not have authority to do so. *Held*, that in the absence of such a showing the attorneys will be presumed to have had the requisite authority to file the brief for appellees.

Alsmeier v. Adams, 219, 261 (16).

AUTOMOBILES—

Use of streets, see MUNICIPAL CORPORATIONS 24-28; NEGLIGENCE.

BANKS AND BANKING—

See BILLS AND NOTES; PRINCIPAL AND AGENT.

BASTARDS—

1. *Inheritance.—Statute.*—Where plaintiff's mother instituted paternity proceedings before a justice of the peace and obtained a judgment that the defendant therein was plaintiff's father, and the mother subsequently married another who took plaintiff into his family, acknowledging her as his own child, she was thereby legitimized and had the same inheritable capacity as the legitimate children of such marriage, since the judgment rendered by the justice of the peace cannot be held to contravene the canons of inheritance as expressed in §3001 Burns 1914, §2476 R. S. 1881, which provides that where a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed to be legitimate. *Tieben v. Hapner*, 650, 654 (2).

2. *Acknowledgment.—Inheritance.—Legislative Power.—Statute.*—Section 3000 Burns 1914, §2476 R. S. 1881, providing that where a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed legitimate, is a proper exercise of the unlimited power of the legislature to prescribe the canons of inheritance, and such statute is effective in declaring that an illegitimate child coming within its provisions shall have the inheritable capacity of a legitimate child.

Tieben v. Hapner, 650, 653 (1).

BENEFITS—

Accepting, of judgment necessitates dismissal of appeal, see APPEAL 4, 75.

Accepting, of fraudulent transaction as constituting conspiracy, see CONSPIRACY.

BILLS AND NOTES—

See PRINCIPAL AND AGENT.

1. *Bank Check.—Liability of Drawer or Signer.*—A check is a written contract for the payment of money and the drawer or signer of the bill by the act of drawing and delivery becomes bound to pay if the acceptor does not. *Williams v. Love*, 357, 360 (3).

2. *Bank Checks.—Notice of Dishonor.—Delay.—Answer.—Sufficiency.—Discharge of Endorser.*—In a suit against an endorser to enforce collections of checks dishonored by the bank, an answer, interposing as a defense that notice of the dishonor of the checks

BILLS AND NOTES—Continued.

had not been given the defendant until more than a month thereafter, is good as against demurrer, as such answer shows affirmatively that notice was not given in accordance with the provisions of §9089y3 and §9089z3 Burns 1914, Acts 1913 p. 136, and the defendant was, therefore, discharged from liability as endorser.

Swift & Co. v. Miller, 312, 331 (12).

3. *Bank Checks.—Notice of Dishonor.—Sufficiency of Notice to Agent of Endorser.*—Where one employs an agent to sell goods, and to collect and remit therefor, and furnishes such agent an endorsement stamp to be used in endorsing customers' checks to the principal to buy exchange payable to such principal, which limitation of the use of the stamp is indicated by the language impressed thereon, and the agent, without authority, uses the stamp to endorse his principal's name on his personal checks, which were subsequently dishonored by the bank, and suit is brought against the principal, as endorser, to enforce collection of the checks, a notice of the dishonor of such checks to the agent and his successor is not notice to the principal or to "his agent in that behalf" within the meaning of §9089s3 Burns 1914, Acts 1913 p. 136.
Swift & Co. v. Miller, 312, 331 (11).
4. *Bank Check.—Presentment.—Time.*—As between the holder and drawer of a check delay in presentment will not ordinarily discharge the drawer from liability, but if loss results from the delay for which the drawer is not responsible, the delay is at the peril of the holder.
Swift & Co. v. Miller, 312, 326 (8).
5. *Bank Check.—Presentment.—Time.—Delayed Notice of Dishonor.—Discharge of Endorser.*—As between the holder of a check and an endorser, unreasonable delay in presentment for payment, or in giving notice of dishonor, will discharge the endorser from his liability without regard to whether such delay did or did not occasion loss to the holder.
Swift & Co. v. Miller, 312, 326 (9).
6. *Presentment.—Delay.—Answer.—Sufficiency.*—Under §9089s2 Burns 1914, Acts 1913 p. 132, which provides that an instrument payable on demand must be presented for payment within a reasonable time, in an action against the endorser to enforce collection of checks, an answer was filed interposing the defense that there had been a delay of several days in presenting for payment the checks involved and that such delay was unreasonable. *Held*, that such delay was unreasonable and that it was error to sustain a demurrer to such answer.
Swift & Co. v. Miller, 312, 330 (10).
7. *Bank Check.—Presentment.—Time.*—Under §9089s2 Burns 1914, Acts 1913 p. 132, providing that an instrument payable on demand, such as a bank check, must be presented within a reasonable time after its issue, such reasonable time for presentment, under ordinary conditions, when the holder resides at the place where the check is made payable, includes all of the banking hours of the day immediately following the day on which the check is received.
Swift & Co. v. Miller, 312, 325 (6).
8. *Bank Check.—Presentment.—Time.*—Where the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and be presented not later than the day immediately following the day of its receipt at the place of payment.
Swift & Co. v. Miller, 312, 326 (7).
9. *Defenses.—Extension of Time.—Effect of.*—Where the maker of a promissory note agrees with the payee that if the latter will extend the time of payment for a definite time the same will then be paid,

BILLS AND NOTES—Continued.

and the time is so extended, such promise constitutes a new, enforceable contract, though the maker may have had a good defense to such note before the agreement to extend was made.

Merchants Nat. Bank v. Nees, 290, 307 (14).

BOARD OF COMMISSIONERS—

See APPEAL 84; COUNTIES; MUNICIPAL CORPORATIONS.

BONDS—

See APPEAL; PLEADING 9.

BOUNDARIES—

An instrument or survey may give color of title to land where boundaries and the extent thereof can be ascertained therefrom, see ADVERSE POSSESSION 6.

BRIEFS—

See APPEAL 36, 39-53.

BROKERS—

Real Estate Brokers.—Fraud.—Liability.—Where it appears from the evidence that one of the appellants, a real estate broker, entered into a contract with the appellees to sell their land and did negotiate a sale of such land, but represented to appellees that he could secure a price for their land much less than that actually received and, by means of a conveyance to an associate, who then conveyed the land to the real purchaser, defrauded the appellees of a large part of the purchase money, which money so fraudulently obtained was divided between himself and coappellants, *held*, that even if no actual fraud were shown, the conduct of such broker would amount to constructive fraud, as the contract to sell the real estate for appellees created a fiduciary relation which cast upon him the duty of acting in the utmost good faith.

Smith v. Fiscus, 156, 159 (1).

BURDEN OF PROOF—

See EVIDENCE; PLEADING 13.

In action against interstate carrier, where special contract is interposed as defense, see CARRIERS 1-4.

CANCELLATION OF INSTRUMENTS—

1. *Complaint.—Damages.—Allegation of.*—In an action to set aside a contract for the sale of real estate and deeds made pursuant thereto as fraudulent and void, the complaint is not fatally defective for failure to allege specifically the value of the real estate conveyed and the consequent damages, where there is an averment that nothing of value was received by the plaintiff as a consideration for executing the deeds to the realty involved, and it is clearly shown by the allegations that all the parties treated the realty as of value, the reasonable inference to be drawn from such averments being that damage resulted. *Brown v. Young*, 364, 372 (1).

2. *Complaint.—Statu Quo.*—In an action to set aside deeds as fraudulent, the complaint is not fatally defective for failure to allege therein that the defendants had been placed in *statu quo* where there are averments showing that the plaintiff received nothing of value as a consideration for the execution of the deeds involved in the action.

Brown v. Young, 364, 373 (2).

CANCELLATION OF INSTRUMENTS—Continued.

3. *Complaint.—Sufficiency.—Disaffirmance of Contract.*—In an action to set aside a contract for the sale of real estate and deeds made to defendants pursuant thereto as fraudulent, the complaint is sufficient as against a demurrer raising the question as to whether the contract was disaffirmed within a reasonable time where it avers that the plaintiff "has long prior to this date disaffirmed the said deed" to the defendant, and "also the written contract * * * and given proper and due notice of such disaffirmance and demanded reconveyance thereof to herself," since the court is bound to resolve all reasonable inferences in support of the complaint.

Brown v. Young, 364, 374 (5).

CARRIERS.**I. CARRIAGE OF GOODS, 1-4.****II. CARRIAGE OF PASSENGERS, 5-11.****I. CARRIAGE OF GOODS.**

1. *Interstate Shipment.—Common-Law Liability.—Estoppel to Deny.*—Under the provisions of the Interstate Commerce Act of February 4, 1887, §22, 24 Stat. 387 (§8595 U. S. Comp. St. 1913), declaring that nothing in the act shall abridge or alter the remedies existing at common law or by statute, and that the provisions of the act are an addition thereto and under the Carmack Amendment (Act June 29, 1906, §7, 34 Stat. 595, §8592 U. S. Comp. St. 1913), providing that it was not the purport of the act to deprive any holder of a receipt or bill of any right under existing law, if a carrier, by its own wrongful act, prevented the shipper from exercising his option as to rates and shipping under a contract charging such carrier with full common-law liability, the case is thus taken outside of the federal statute, and the carrier can not deny such shipper his common-law remedy for damages sustained by failure to safely transport and deliver freight.

Toledo, etc., R. Co. v. Milner, 208, 217 (5).

2. *Interstate Shipment.—Invalid Shipping Contract.—Common-Law Liability.*—When an interstate shipper of freight is compelled to ship under a special contract restricting the liability of the carrier, or not at all, and is denied the privilege of paying the higher authorized rate and shipping under such unrestricted common-law liability, as is authorized by the federal statute, such contract is not fairly or freely entered into and it affords the carrier no protection from its common-law liability, since it is invalid.

Toledo, etc., R. Co. v. Milner, 208, 216 (4).

3. *Interstate Shipment.—Special Contract.—Burden of Proof.*—Where a carrier interposes as a defense a special contract limiting its liability, or showing nonliability, the burden is on it to show a valid contract and to establish the reasonableness of the provision on which it relies and, if there is no valid contract, such defense is not available.

Toledo, etc., R. Co. v. Milner, 208, 217 (6).

4. *Interstate Shipments.—Option of Rates.—Effect.—Invalid Shipping Contract.*—Under the federal law regulating interstate shipments, there may be at least two rates that are binding on the parties, if they have been filed with the Interstate Commerce Commission and duly approved and published, the shipper having the option of choosing the rate under which he will ship, and, when such option is exercised, the right of the shipper to damages, if any, may be determined in accordance with any reasonable stipulations accompanying the rate under which the shipment is made, but the carrier can not by contract relieve itself from liability for actionable negligence.

Toledo, etc., R. Co. v. Milner, 208, 213 (3).

CARRIERS—Continued.

II. CARRIAGE OF PASSENGERS.

5. *Actions for Injuries.—Answers to Interrogatories.—General Verdict.—Consistency.*—In an action for damages for personal injuries alleged to have been due to the defendant company's negligence in permitting a freight truck to be left on the platform of its passenger station in such a position as to fall or roll against plaintiff, who was waiting to board a train, the jury answered interrogatories to the effect that the plaintiff was injured in the place and manner alleged; that the presence of the truck on the platform was dangerous; that at the time of the injury a person waiting to take passage on a train was leaning against or climbing upon the truck without defendant's knowledge; and that the immediate and proximate cause of plaintiff's injury was the act of such other person in getting upon the truck, thus causing it to fall or roll against the plaintiff. *Held*, that such answers are not necessarily contradictory or inconsistent with the general verdict.

Lake Erie, etc., R. Co. v. McConkey, 447, 454 (6).

6. *Duty of Carrier.*—Where it appears that a passenger on an interurban car notified the conductor that he wished to alight at stop 32, but because of the negligence of the conductor he was carried to stop 34, with the surroundings of which he was unacquainted, and was then told that he had reached his destination and directed to alight, and was killed while attempting to walk back along the tracks to stop 32, the relation of carrier and passenger, under such circumstances did not terminate with the departure from the car, as the carrier owed the passenger the duty of using a reasonable degree of care to deliver him safely to his proper destination, since, the relation of carrier and passenger having once been established, it continues until terminated by the voluntary act of the passenger or by the act of the carrier, under circumstances justifying its termination and such termination was not justified by the act of the railroad in putting off the passenger at the wrong place.

Terre Haute, etc., Traction Co. v. Hunter, 399, 406 (1).

7. *Duty of Carrier.*—At the end of the journey the relation of passenger and carrier continues until the passenger has had a reasonable opportunity to depart from the train or car and the station in safety.

Terre Haute, etc., Traction Co. v. Hunter, 399, 406 (2).

8. *Injury to Passenger.—Intervening Agency.*—Where a passenger on an interurban car was negligently carried past his destination to a stop with the surroundings of which he was totally unacquainted, and was there informed by the conductor that he had arrived at his station and was directed to leave the car, and upon discovering that he had been put off at the wrong point, started walking back along the defendant's tracks toward his original destination and while so doing was struck and killed by another car, the conduct of the decedent in acting as he did under the circumstances cannot, as a matter of law in determining the sufficiency of the complaint, be held to be such an intervening agency as breaks the line of causation and becomes the responsible cause of the injury, thereby relieving the defendant of its antecedent negligence, since the defendant company might reasonably have anticipated that the decedent would act as he did under the circumstances and was bound to know the perils attendant upon such a course of action.

Terre Haute, etc., Traction Co. v. Hunter, 399, 415 (5).

9. *Injury.—Intervening Agency.*—Where a passenger on an interurban car was negligently carried past a stop where, as he had informed the conductor, he wished to be put off the car, and in attempting to reach his original destination, without directions or

CARRIERS—Continued.

assistance from the conductor, by walking back along defendant's tracks, was struck and killed by another car, the fact that the decedent elected to walk upon the railroad tracks rather than take another way, can not be held, as a matter of law, to be such an intervening cause as would relieve liability for the original, antecedent negligence, but should be submitted to the jury upon a question of decedent's contributory negligence.

Terre Haute, etc., Traction Co. v. Hunter, 399, 413 (3).

10. *Judicial Notice.—Character of Interurban Car.*—The court will take judicial notice of the fact that interurban cars are propelled by electricity and are much more easily stopped and started than steam trains which usually consist of several cars and a heavy engine.

Terre Haute, etc., Traction Co. v. Hunter, 399, 416 (6).

11. *Passenger Carried Beyond Destination.—Duty of Carrier.*—Where a passenger is carried beyond his station to another station, it is the duty of the company to use reasonable care to see that the passenger is delivered at his proper station; and this duty, in the instant case, might have been fulfilled by giving proper directions as to the way to be taken, with instructions as to the dangers likely to be encountered, or by proper arrangements for transportation upon a returning train.

Terre Haute, etc., Traction Co. v. Hunter, 399, 414 (4).

CASES—

For cases cited, see p. viii.

CAUSE OF ACTION—

Joinder, see ACTION 2.

CHANCERY—

Powers of court, see REMAINDERS.

CHANGE OF GRADE—

Of streets, see EMINENT DOMAIN; MUNICIPAL CORPORATIONS.

CHECKS—

See BILLS AND NOTES; LIMITATION OF ACTIONS.

CITIES—

See MUNICIPAL CORPORATIONS.

COAL—

See MINES AND MINERALS.

COLLATERAL ATTACK—

See JUDGMENT.

COLOR OF TITLE—

See ADVERSE POSSESSION.

COMMERCE—

Interstate Shipments.—State Legislation.—Shipments which are interstate commerce are governed by federal statutes, which supersede state legislation thereon.

Toledo, etc., R. Co. v. Milner, 208, 213 (2).

COMMON CARRIERS—

See CARRIERS.

COMMON COUNCIL—

See MUNICIPAL CORPORATIONS.

COMMON LAW—

Rights of interstate shippers under, in addition to Interstate Commerce Act, see CARRIERS 1-4.

Complaint, sufficiency under, see MASTER AND SERVANT.

Complaint stating two causes, motion to separate, see PLEADING 6.

Bequest of personalty under, see WILLS 3.

COMPLAINT—

See PLEADING.

Joinder in, of independent causes growing out of same transaction, see ACTION 2.

Sufficiency of, waiver of objection, see APPEAL 6, 7, 8.

In action to set aside contract and deeds, when necessary to allege value of property conveyed, see CANCELLATION OF INSTRUMENTS 1.

CONCLUSION—

Interrogatories calling for, effect, see TRIAL 18-21.

CONCLUSIVENESS—

See APPEAL; JUDGMENTS 2.

CONDITIONAL SALES—

Replevin of goods sold under, demand, see REPLEVIN; SALES 1.

CONSIDERATION—

See CONTRACTS; PLEADING 10; SALES 9.

A complaint alleging that plaintiff received no, not defective for failure to allege that defendant had been placed in *statu quo*, see CANCELLATION OF INSTRUMENTS.

Renunciation of rights as heir as, validity, see DESCENT AND DISTRIBUTION 2.

As determining whether contract is entire or severable, see INSURANCE 4.

CONSPIRACY—

1. *Fraud.—Defenses.*—It is no defense that there was no conspiracy entered into in the beginning of the transaction and, if the arrangement between appellants was entered into during the progress of the negotiations for the sale of appellees' land, and if appellants knowingly accepted benefits from such arrangement, they thereby created an illegal conspiracy. *Smith v. Fiscus*, 156, 159 (2).

2. *Fraud.—Liability.*—No affirmative fraudulent representation need be shown to establish a fraudulent conspiracy; a concealment of the true nature of the action being sufficient to bind all who accede to, or concur in such concealments, and all parties to an illegal conspiracy are bound by the acts of their agents.

Smith v. Fiscus, 156, 160 (3).

CONSTRUCTION—

See CONTRACTS; JUDGMENTS; PLEADING; WILLS.

CONSTRUCTIVE FRAUD—

See **BROKERS; FRAUD; MUNICIPAL CORPORATIONS 12-19.**

CONSTRUCTIVE TRUSTS—

See **TRUSTS.**

CONTINGENT ESTATES—

See **WILLS; PARTITION 12, 13.**

CONTRACTS—

See **CANCELLATION OF INSTRUMENTS; DESCENT AND DISTRIBUTION 2; MUNICIPAL CORPORATIONS; SALES.**

Party to, treatment of as in force for recovery of benefits, see **ESTOPPEL.**

Induced by fraud, validity, see **FRAUD.**

Parol, for sale of lands, see **FRAUDS, STATUTE OF.**

Action can not be predicated on illegal, see **ACTION 1.**

Bank checks are, see **BILLS AND NOTES 1.**

Special, for interstate shipment, when invalid as limiting liability of carrier, see **CARRIERS 1-4.**

Entire or severable, see **INSURANCE 4.**

Parol, for partition, effect, see **PARTITION 6.**

1. *Anticipatory Breach.—Actions.*—Where a party to a contract containing mutual and interdependent conditions and obligations disables himself from performing, or prevents the other party from performing, or, before the time of performance arrives, repudiates the contract and refuses to be bound thereby, communicating such repudiation to the other party, the latter is not only excused from further performance on his part, but may at his option, treat the contract as terminated for all purposes of performance and maintain an action at once for all damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance.

Indiana Life Endowment Co. v. Carnithan, 567, 577 (4).

2. *Anticipatory Breach.—Actions.*—Where an action for damages is predicated on a repudiation of a contract, such repudiation must be positive and absolute and unconditional in order that it may be treated as an anticipatory breach of such contract.

Indiana Life Endowment Co. v. Carnithan, 567, 578 (5).

3. *Fraud.—Remedies.*—It is the rule, subject to certain exceptions, that one who has been induced by fraud to execute a contract and is damaged thereby may make such fraudulent conduct the basis of an action, or he may set the same up as a defense to an action on the contract.

Paxton-Eckman Chem. Co. v. Mundell, 45, 50, 51 (3).

4. *Rescission.—Notice.*—A formal written notice is not necessary to rescind a contract, it being sufficient that there is some positive act on the part of the party who rescinds that shows such an intention.

Brown v. Young, 364, 374 (4).

5. *Right to Rescind.—Waiver by Delay.*—The length of time a party to a contract permits to elapse does not necessarily determine the right to rescind, the governing consideration being whether the delay has been long enough under the circumstances of the particular case, to result in prejudice to the other party.

Brown v. Young, 364, 374 (3).

CONTRACTS—Continued.

6. *Validity.—Salary of Public Official.—Assignment.—“Pooling.”*—Where A and B, owners of a majority of the capital stock of a newspaper publishing company to the management of which each devoted all of his time, entered into an agreement immediately prior to A's acceptance of an offer of an appointment to the position of postmaster, which would require all his time, whereby B undertook to perform the services previously rendered the newspaper company by both parties and in consideration therefor A agreed to pay B a sum equal to one-half his salary as postmaster, such agreement is not invalid or illegal as being an assignment of either an earned or an unearned salary of a public officer, or a pooling of A's salary of postmaster with the income of the newspaper company. *Moynihan v. Rockhill*, 685.

CONTRIBUTORY NEGLIGENCE—

See NEGLIGENCE; CARRIERS 9; MASTER AND SERVANT.

CONVEYANCES—

See DEEDS; ESTATES; RAILROADS.

COUNTIES—

Appeal from finding of board of commissioners, defective transcript, effect in absence of objection, see APPEAL 84.

Board of commissioners of, appeal under general statutes, right of, see MUNICIPAL CORPORATIONS 1.

COUNTY AUDITOR—

Failure of, to certify transcript on appeal, effect of in absence of objection, see APPEAL 84.

COURTS—

See APPEAL; DIVORCE; EQUITY; JUDGMENTS; PARTITION; TRIAL; WITNESSES.

Record.—Nunc Pro Tunc Entries.—When Made.—As a general rule a *nunc pro tunc* entry can be made only where there is some memorial or other minute of the transaction in the case from which what actually took place in the prior proceeding can be clearly ascertained or known; and parol evidence alone is not sufficient to authorize a *nunc pro tunc* entry or to change a record after the proceedings have ceased to be *in fieri*, and after the term at which the record was made. *Merchants Nat. Bank v. Nees*, 290, 296 (1).

CROSS-ERRORS—

See APPEAL 20.

CROSS-EXAMINATION—

See WITNESSES.

CUSTOMS AND USAGES—

Duty of informing as to, of a particular business insured, see INSURANCE 10.

DAMAGES—

See EMINENT DOMAIN; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; NUISANCE.

When unnecessary to allege, in action to set aside deed for sale of real estate, see CANCELLATION OF INSTRUMENTS 1.

Interest recoverable as, see INTEREST.

DEATH—

Of party pending appeal, failure to amend assignment of errors to correspond to order of substitution, effect, see **APPEAL 33**.

Wrongful, action, see **CARRIERS; MASTER AND SERVANT; NEGLIGENCE**.

DEBTOR AND CREDITOR—

Husband's debts, liability of wife to make provision by will for payment, see **HUSBAND AND WIFE 2; WILLS 1**.

DECEDENTS—

See **EXECUTORS AND ADMINISTRATORS; DESCENT AND DISTRIBUTION; WILLS; WITNESSES**.

DECISION—

"Finding" equivalent to, in assigning ground for new trial, see **APPEAL 12**.

DEEDS—

Lost or void, may give color of title, see **ADVERSE POSSESSION 5, 9, 14**.

Action to set aside, complaint, see **CANCELLATION OF INSTRUMENTS**.

Estoppel by, see **ESTOPPEL**.

Absolute on face, parol agreement, see **MORTGAGES**.

Of decedents, testimony as to contents, see **WITNESSES**.

1. *Construction.—Evidence of Extrinsic Facts.—Admissibility.*—Where the description in a deed is not ambiguous, and no issue is tendered directly attacking such descriptions, or making a reformation or correction material, extraneous evidence affecting same is not proper. *Ault v. Clark*, 55, 61 (4).

2. *Extent of Grant.*—While a railroad company may take an estate in fee, or a right of way of definite width, yet the parties may by contract create a less estate than a fee, or a right less in extent than that which the law authorizes the grantee to acquire. *Vandalia R. Co. v. Topping*, 657, 665 (4).

3. *Construction.—Description.—Judicial Sales.—Evidence of Extrinsic Facts.—Admissibility.*—While it is the office of a description in a deed of conveyance to furnish the means of identification rather than to identify the land, and the same is to be liberally construed to effectuate the intent of the parties, and extraneous or parol evidence is competent to apply the terms of a deed to the subject-matter, so as to explain vague or conflicting descriptions and ascertain the intention of the parties, such rules of construction have no application to a conveyance made pursuant to a judicial decree, and may not be resorted to in any case for the purpose of thwarting the intent of the parties. *Ault v. Clark*, 55, 60, 61 (3).

4. *Description.—Judicial Sales.—Evidence of Extrinsic Facts.*—Where plaintiff in an action to quiet title and for possession had an administrator's deed issued pursuant to a judicial sale for an undivided two-thirds of the land described, and a deed from the widow of decedent conveying the undivided one-third, and no issue was tendered seeking the reformation of the widow's deed, evidence to show that the land described in the complaint was the only land owned by decedent or his widow and was the land intended to be conveyed, was inadmissible, the descriptions in the deeds being complete and certain. *Ault v. Clark*, 55, 62 (6).

5. *Merger.*—Where it is sought to have an agreement as to partition merged into subsequent deeds, the doctrine of "merger" can have

DEEDS—Continued.

no application where the estates created by the deeds are not equal to, or coextensive with, the estates created by the partition.

Murray v. Murray, 132, 144 (4).

6. *Merger of Oral Negotiations.*—As a general rule all oral negotiations leading up to the execution of a deed are merged therein.

Murray v. Murray, 132, 144 (3).

7. *Unambiguous Writings.—Construction.*—A deed or other writing that is unambiguous is to be so interpreted as to carry into effect the intention of the parties expressed by the language employed.

Ault v. Clark, 55, 61 (5).

DEFAULT—

See JUDGMENTS.

DEMAND—

See REPLEVIN.

DEMURRER—

See PLEADING.

For review of rulings as to, see APPEAL.

DESCENT AND DISTRIBUTION—

See EXECUTORS AND ADMINISTRATORS; STATUTES; WILLS.

1. *Advancements.—Presumptions.*—Courts generally look with favor on an equal distribution of an estate cast upon heirs, and when it is disclosed that an heir received from the ancestor money or property during the lifetime of the ancestor, there is a presumption that the same was an advancement. *Boyer v. Boyer*, 73, 78 (1).

2. *Rights of Heirs.—Renunciation.*—A contract between father and son, whereby the latter agrees in consideration of the transfer of certain property to him at that time to relinquish all claim as heir to the property of which the father might die seized, is founded on a valid consideration, and, in the absence of fraud, is binding on the son, though the amount received by him was not equal to his full proportionate share of the estate. *Boyer v. Boyer*, 73, 78 (2).

DESCRIPTION—

Void deed may give color of title if description is sufficient to identify the land, see ADVERSE POSSESSION 6, 9, 14.

Amendments of, in complaint, effect, see PLEADING 1.

DETERMINABLE FEE—

See ESTATES 1, 2; WILLS 15-17.

DISSOLUTION—

Of partnership, grounds, see PARTNERSHIP.

DISTRIBUTION—

See DESCENT AND DISTRIBUTION.

DIVORCE—

1. *Alimony.—Adultery of Wife.—Effect.*—While it is true that alimony will not generally be awarded the wife where divorce is granted the husband on the ground that she has been guilty of promiscuous adultery, yet §1083 Burns 1914, §1045 R. S. 1881,

DIVORCE—Continued.

vests the court with sufficient authority to award alimony in such a case where it appears that the wife has been instrumental in accumulating the property possessed by the husband.

Files v. Files, 396, 397 (1).

2. *Attorney Fees.—When Allowable.—Statute.*—The power to award fees to the wife's attorneys in an action for divorce coming to the court solely by statutory authority, there must be, in making such allowances, strict adherence to the terms of the statute (§1080 Burns 1914, §1042 R. S. 1881) which, while permitting the award of fees to the wife's attorneys during the pendency of the petition for divorce does not authorize such an allowance to be made primarily as a part of the final judgment. *Files v. Files*, 396, 398 (2).

EASEMENTS—

See DEEDS; RAILROADS.

EJECTMENT—

1. *Direction of Verdict.—Title in Fee Simple.—Evidence to Prove.*—

In an action in ejectment it was not error for the trial court to refuse to peremptorily instruct the jury to find for the defendant because of the failure of the plaintiff to prove the record title upon which he relied to show ownership in fee simple where the plaintiff also claimed title by prescription and produced evidence tending to prove such claim, since title by prescription is sufficient to support an allegation of title in fee simple.

Vandalia R. Co. v. Topping, 657, 668 (8).

2. *Erroneous Instruction.—Presumption.—Theory of Pleadings.*—

Where, in an action to quiet title against a railroad company, which by its cross-complaint claimed but a right of way across the land involved, the court instructed the jury that a fee-simple title means the highest title known to the law and that neither party could recover without establishing such title, such instruction was erroneous and presumed to be harmful, and informing the jury that the plaintiffs, who were claiming the fee, would have to show a fee-simple title to recover, and finding for them does not cure the error as to the defendant, since a fee-simple title in one person and an easement in another are not incompatible estates.

Vandalia R. Co. v. Topping, 657, 665 (5).

3. *Exemplary Damages.—Statute.*—Section 1108 Burns 1914, §1062 R. S. 1881, providing that in actions in ejectment the jury might award exemplary damages in case of wanton aggression, does not apply where the defendant is shown to have acted in good faith under what he believed to be a valid right.

Vandalia R. Co. v. Topping, 657, 667 (6).

ELECTION—

See STATUTES; WILLS.

ELECTION OF REMEDIES—

See APPEAL 75, 83; FRAUD 13; PLEADING 4.

Breach of Warranty.—Fraud.—Where, in an action to enforce collection of notes given in payment of the purchase price of a warranted stallion, defendant elected to rely on a breach of the warranty as a defense, which defense did not exist in fact by reason of the death of the stallion before a certain date in the warranty, he did not thereby estop himself, on a second trial of the cause, under the doctrine of the election of remedies, from pleading and relying on fraud as a defense, for to render such doctrine applicable to any

ELECTION OF REMEDIES—Continued.

particular case, two things are essential: First, two remedies must be available; and, second, such remedies must be inconsistent, and, if the party, in whose favor the right of election exists, by any decisive act, with knowledge of all the facts and his rights thereto, chooses his remedy, such choice is final and absolute and bars his right to later choose the other remedy. But where, as in the case at bar, the party erroneously thinks he has a remedy that does not in fact exist, a mistaken selection and prosecution of such remedy will not estop a later election to pursue an appropriate remedy, though it be inconsistent with the one formerly prosecuted.

Nave v. Powell, 274, 284 (6).

EMINENT DOMAIN—

1. *Change in Street Grade.—Compensation.—Street Railway.—Liability.*—Where a street railway company adjusts its roadbed to conform with a newly established grade of a street, as fixed by a city board of public works, it is not liable in damages to an abutting property owner, since the injury under such circumstances would be occasioned not by its act or conduct but by the city in changing the grade of the street.

Butler v. City of Kokomo, 519, 526 (6).

2. *Change of Street Grade.—Street Railway.—Liability.—Power of Board of Public Works.*—A street railway company is liable to an abutting property owner for special damages resulting from a change in the grade of a street made solely for its accommodation and benefit, and the company will not be relieved of liability because such change in grade was made pursuant to the authority of the board of public works, since that body has no power to authorize special injury to private property.

Butler v. City of Kokomo, 519, 526 (5).

3. *Public Improvements.—Change of Grade of Street.—Liability to Abutting Owners.*—It is the general rule, in the absence of a statute allowing compensation or unless there is damage due to negligence, that an abutting property owner cannot recover damages occasioned by a change of grade of a street or alley in the improvement of the same by the city authorities.

Butler v. City of Kokomo, 519, 525 (1).

4. *Streets.—Appropriation to New Use.—Compensation.—Electric Railways.*—The construction of a street or interurban railroad upon a public street or alley is not a new and additional servitude entitling an abutting property owner to compensation for such occupancy.

Butler v. City of Kokomo, 519, 525 (2).

EMPLOYER'S LIABILITY ACT—

See PLEADING 4.

EMPLOYEES—

See MASTER AND SERVANT.

EQUITY—

Jurisdiction of, in partition proceedings by beneficiaries under a will, see REMAINDERS.

ESTATES—

See DESCENT AND DISTRIBUTION; REMAINDERS; WILLS.

Of railroad companies in land, see DEEDS 2; RAILROADS.

1. *Determinable Fee.—Inheritance.*—A qualified or determinable fee is an estate of inheritance, descendible to heirs and may be devised or assigned.

Coquillard v. Coquillard, 426, 434 (3).

ESTATES—Continued.

2. *Determinable or Qualified Fee.*—A determinable or qualified fee is an estate in fee for the reason that it may continue forever, and it is an estate of inheritance descendible to heirs and may be assigned or devised. *Coquillard v. Coquillard*, 489, 499 (3).
3. *Life Estate.—Tenant a Trustee.*—A life tenant is a trustee for the remainderman in the sense that he must exercise reasonable precautions to preserve the property intact for transmission to the remainderman at the termination of the life estate, and he may not injure or dispose of it to his detriment. *Gibson v. Brown*, 460, 470 (7).
4. *Merger.*—Where defendants are claiming under an alleged partition made prior to the deed under which they derived their title and there was no evidence of a subsequent partition or a ratification of the alleged prior partition, a finding that the defendants take a larger estate than that described in their deed is erroneous. *Murray v. Murray*, 132, 148 (9).
5. *Merger of Legal and Equitable Titles.*—The intention of the party, expressed or implied, is the true test of whether there has been a merger, and where such merger, in the light of all the circumstances, would be disadvantageous to him, then the merger of an equitable estate with a legal estate will not be presumed. *Murray v. Murray*, 132, 144 (5).

ESTATES TAIL—

See **WILLS**.

ESTOPPEL—

- Of carrier to deny liability under common law, application of rule, see **CARRIERS** 1-4.
- Of insurance companies to rely on warranties in policy, see **INSURANCE** 11.
- Of agent, deposit of funds, liability, see **PRINCIPAL AND AGENT** 5.
1. *Claim Under Contract.—Election.*—Where, in an action based on a breach of a contract of insurance by the insurer, it appears that the plaintiff, after an alleged repudiation of the policy by the defendant company, elected to still treat the contract as in force for the recovery of benefits thereunder, he thus kept such contract alive for all purposes both for himself and for the insurer and he estopped himself from afterwards predicating a suit thereon for damages for its alleged repudiation. *Indiana Life Endowment Co. v. Carnihan*, 567, 583, 586 (10).
 2. *By Deed.*—Where the defendants derived their title through a deed to their father and where there is no showing of fraud or mistake, they are estopped by that deed from claiming, under a partition proceeding prior thereto, any larger estate or interest than that expressed in their deed. *Murray v. Murray*, 132, 147 (8).
 3. *By Deed.*—A person can be estopped by deed only when such deed sets forth the precise fact upon which such an estoppel is to operate. *Murray v. Murray*, 132, 145 (6).
 4. *By Quitclaim Deed.*—No estoppel arises either from making or accepting a quitclaim deed, and both the grantor and the grantee may prove that no interest or estate was transmitted thereby. *Murray v. Murray*, 132, 145 (7).

EVIDENCE.

- I. JUDICIAL NOTICE, 1, 2.
- II. PRESUMPTIONS, 3-7.
- III. ADMISSIONS, 8.
- IV. DECLARATIONS, 9.

- V. DOCUMENTARY EVIDENCE, 10, 11.
- VI. HEARSAY, 12.
- VII. PAROL EVIDENCE, 13, 14.

EVIDENCE—Continued.

See ADVERSE POSSESSION; CARRIERS; COURTS; DEEDS; FRAUD; GIFTS; INSURANCE; JUDGMENTS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; NEGLIGENCE; PLEADING; RAILROADS; SALES; WILLS; WITNESSES.

For review of ruling as to, see APPEAL.

Reception of, see TRIAL.

Of extrinsic facts, admissibility as to descriptions, see DEEDS 1-4.

I. JUDICIAL NOTICE.

As to character of interurban car, see CARRIERS 10.

1. *Uncontroverted Pleadings.*—Where the only evidence properly before the court was the complaint, the allegations of which were uncontroverted, the court was not precluded from finding the facts to be otherwise than as set forth in such complaint by resorting to its judicial knowledge. *Graves v. Kelly*, 164, 170 (5).
2. *Record.*—In an action commenced under §405 Burns 1914, §396 R. S. 1881, seeking relief from a judgment, the court may take judicial notice of its record made in the case in which such judgment was obtained and the facts established by such record
Graves v. Kelly, 164, 170 (6).

II. PRESUMPTIONS.

As to receipt of money by heir, advancement, see DESCENT AND DISTRIBUTION 1.

3. *Action of Council.*—The common council of a municipality is presumed to have acted in good faith and according to law in the performance of its duty in a proceeding to vacate a street or alley.
Windle v. City of Valparaiso, 342, 354 (12).
4. *Board of Public Works.—Official Acts.*—Where changes are made in a public improvement by a board of public works during the progress of the work, it is presumed that the board acted in good faith.
Buller v. City of Kokomo, 519, 527 (8).
5. *Board of Public Works.—Official Acts.*—A city board of public works, being a statutory body, is presumed to have conformed to the provisions of the statutes in improving and changing the grade of a street.
Buller v. City of Kokomo, 519, 526 (4).
6. *Presumption.—Changes in Public Improvement by Board.—Assessment of Benefits.—Effect of.*—Where, in the improvement of a public street, there has been after the completion of the work, an assessment of benefits to property affected, as provided by §8716 Burns 1914, Acts 1909 p. 423, it is presumed that any special damage to abutting property occasioned by the improvement was properly adjusted in the fixing of the assessment.
Buller v. City of Kokomo, 519, 527 (10).
7. *City Board of Public Works.—Official Acts.*—A city board of public works being charged with official duties by statute, there is a presumption that such duties have been discharged in accordance with the requirements thereof. *Spurrier v. Vater*, 669, 676 (5).

III. ADMISSIONS.

8. *Admissions.—Effect.*—An admission as to a writing is like an admission as to any other fact, and it justifies the introduction of the writing in evidence.
Coca Cola Bottling Co. v. International Filler Co., 421, 423 (2).

EVIDENCE—Continued.**IV. DECLARATIONS.**

9. *Res Gestae*.—*Admissibility*.—Evidence given by the claimant of land by adverse possession and by the members of her family and other witnesses, relating to declarations made and acts performed while in possession of the land, relating to the character and extent of claimant's possession and the use and control of the land by her and such members of her family under her directions, was competent to qualify, explain and characterize such possession, since such declarations and acts were part of the *res gestae* of the continuing act of possession.

Hitt et al. v. Carr, 80, 121 (29).

V. DOCUMENTARY EVIDENCE.

Judgment in former suit, admissibility as against defendant not a party thereto, see JUDGMENTS 2.

Transcript of record of former suit, admissibility, see NAMES 2.

10. *Private Records*.—*Abstracts of Title*.—*Admissibility*.—An abstract of title is not admissible in evidence for the purpose of showing copy of portions of summons and return in a former suit affecting the property abstracted on the theory that the item was a regular entry made by third parties in the due course of business, unless it should appear that the making of the abstract, including the reference to the summons and return, was a part of the *res gestae* of some transaction between the parties to the action in which it is offered and that the entries were contemporaneous with such transaction and made in the regular course of business, or that they were such entries made in the due course of business in some transaction between the party against whom they are offered and a third party under circumstances that gave them probative value under the issues.

Hitt et al. v. Carr, 80, 96 (10).

11. *Private Records*.—*Abstracts of Title*.—An abstract of title prepared by an abstract company is a private record and its admissibility in evidence is not governed by the rules applicable to the admission of public records and documents.

Hitt et al. v. Carr, 80, 96 (11).

VI. HEARSAY.

12. *Admissibility*.—*Written Memorandum*.—In an action by a vendor against a vendee to collect for goods sold, a memorandum given the vendor by the carrier showing the receipt of the goods, the original bill of lading being unaccounted for, is not admissible in evidence except to refresh the recollection of a witness otherwise competent to testify concerning the shipment or merely to show that a receipt for the goods had been given by the carrier, but such memorandum is not competent primary evidence of its contents, since it is entirely hearsay as to such facts.

Coca Cola Bottling Co. v. International Filler Co., 421, 424 (3).

VII. PAROL EVIDENCE.

Sufficiency of, to change record, see COURTS.

13. *Lost Deeds*.—*Color of Title*.—The contents of an instrument describing land conveyed or given to a claimant, and which has been lost or is beyond the jurisdiction of the court, may be proved by parol for the purpose of showing color of title.

Hitt et al. v. Carr, 80, 108 (21).

EVIDENCE—Continued.

14. *Unambiguous Transcript of Record.*—An unambiguous transcript of the record in a former suit cannot be affected or modified by parol evidence. *Hitt et al. v. Carr*, 80, 91 (2).

EXCEPTIONS—

See APPEAL; NEW TRIAL.

EXECUTION—

Evidence.—Sale of Land.—To prove title by a sale on execution, or order of sale, the purchaser must show a valid judgment, an execution or an order of sale, and deed.

Vandalia R. Co. v. Topping, 657, 668 (7).

EXECUTORS AND ADMINISTRATORS—

See DESCENT AND DISTRIBUTION; WILLS.

An order to reform a final report is not a final judgment, see APPEAL 3.

Time for perfection of appeal, dismissal, see APPEAL 26.

EXEMPLARY DAMAGES—

In ejectment, when recoverable, see EJECTMENT 3.

FALSE REPRESENTATIONS—

See FRAUD.

FEE SIMPLE—

See EASEMENTS; WILLS.

FELLOW SERVANTS—

See MASTER AND SERVANT; TRIAL 20.

FIDUCIARY RELATIONS—

See TRUSTS.

Duty of persons acting in, see BROKERS.

FINDINGS—

See APPEAL 67-76; TRIAL.

Conclusiveness of, on appeal, see ADVERSE POSSESSION 13, 15.

See WORDS AND PHRASES.

FIRE ESCAPES—

For hotels, testing of, see MASTER AND SERVANT 24.

FIRE INSURANCE—

See INSURANCE.

FIRES—

Protection, duties of water company, see WATERS AND WATERCOURSES 3-5.

FORFEITURES—

See INSURANCE 12; MINES AND MINERALS 3.

FRANCHISES—

See WATERS AND WATERCOURSES 1.

FRAUD—

See **BROKERS; CONSPIRACY; CONTRACTS; ELECTION OF REMEDIES; MUNICIPAL CORPORATIONS 12, 13; PARTNERSHIP; PLEADING 5; SALES.**

1. *Action—Right of Action.*—The mere fact of fraudulent or wrongful conduct in a completed act gives no right of action unless such conduct results in injury to the complaining party.
Alsmeier v. Adams, 219, 252 (10).
2. *Actionable Fraud.—Necessity of Injury.*—A grievance based upon fraud, whether actual or constructive, to be actionable must work an injury in some manner to the complaining party.
Windle v. City of Valparaiso, 342, 355 (14).
3. *Contracts.—Validity.*—Where a person designedly or knowingly causes a false impression to be entertained by another, and by reason thereof such other person is induced to enter into a contract to his detriment, and which he otherwise would not have entered into, such contract is so impressed with fraud as not to be sanctioned by the courts and enforced against the party defrauded.
Paxton-Eckman Chem. Co. v. Mundell, 45, 51 (4).
4. *Constructive Fraud.—What Constitutes.*—Where the conduct of a party results in grave injury, his acts, however innocent, may be constructively fraudulent.
Alsmeier v. Adams, 219, 252 (11).
5. *Constructive Fraud.—Necessity of Intention.*—Fraud may exist, as a matter of law, without any intention to commit a wrong and is known as constructive fraud, and it may consist of any breach of duty, which, if not relieved against, would operate as a fraud.
Windle v. City of Valparaiso, 342, 355 (13).
6. *Expressions of Opinion.*—While mere expressions of opinion concerning the value, utility, future use and the like of property do not as a general rule constitute actionable fraud, statements by a seller that experiments had been made with stock powders, and that it had been ascertained that they would prevent hog cholera, were statements as to existing facts and included matters with which the buyer was unacquainted, and, being false and relied upon by the buyer, constituted actionable fraud.
Paxton-Eckman Chem. Co. v. Mundell, 45, 52 (6).
7. *Misrepresentations.—Expressions of Opinion.*—As a general proposition, a representation to be fraudulent in law must be made concerning a material fact, upon which the party to whom it is made has a right to, and does, rely and it must be one that misleads him to his inquiry; but mere expression of opinion, concerning the value, utility, future use and the like of property, do not in law constitute actionable fraud, though they be false.
Merchants Nat. Bank v. Nees, 290, 303 (9).
8. *Misrepresentations.—Liability.*—Where a vendor of personal property induces one who relies on his statements to purchase personal property by knowingly making false and fraudulent representations as to the quality of the goods sold, such vendor is not relieved from liability for his fraud by the mere fact that the sale is evidenced by a contract expressly omitting warranties.
Martin v. Shoub, 586, 591 (4).
9. *Misrepresentations — Professions of Knowledge.*—Where a party professing to have knowledge falsely represents a thing to exist and makes the representation for the purpose of procuring an undue advantage over a person, with whom he is contracting and who is without knowledge and relies thereon, he is guilty of fraud, although it may not appear that he knew his statements were false.
Merchants Nat. Bank v. Nees, 290, 304 (10).

FRAUD—Continued.

10. *Misrepresentations.—Verdict.—Evidence.*—In an action for damages sustained by reason of a vendor's fraudulent representations whereby a vendee was induced to purchase a spavined stallion, the evidence is sufficient to sustain a verdict for the plaintiff where it shows that the vendor knowingly made false and fraudulent representations that the stallion involved was sound in every way at the time of the sale, whereas it was, in fact spavined and worthless for breeding purposes, and that the vendee was induced to make the purchase by reason of such fraudulent representations.

Martin v. Shoub, 587, 592 (7).

11. *Misrepresentations.—“Warrant.”*—In an action for damages for fraudulent representations inducing the purchase of a spavined stallion, the character and the nature of the language used by the vendor in statements as to the soundness of the horse made prior to the sale showed that such statements were misrepresentations and were not intended as warranties; and, although the word “warrant” occurred in some of the statements, it was used in its colloquial sense, meaning to assure or to affirm confidently.

Martin v. Shoub, 586, 591 (3).

12. *Remedies of Buyer.—Action for Breach of Warranty.*—If misrepresentation, in inducing a sale of personal property, is accompanied by fraudulent intent to deceive, it may support an action for fraud, although an action in tort for breach of warranty would lie.

Martin v. Shoub, 586, 591 (5).

13. *Remedies of Buyer.—Action for Breach of Warranty.*—An action for fraud and an action in tort for breach of warranty, based on the same facts, will not lie at the same time.

Martin v. Shoub, 586, 592 (6).

14. *Remedies.—Effect of Contract.*—Where one has been induced by fraud to enter into a contract, provisions in the contract that all covenants, warranties and agreements are embodied therein and that no other agreement, stipulation or warranty will be recognized unless approved or accepted in writing, do not limit or restrict the party defrauded to the contract nor prohibit him from prosecuting an action for the damages he has sustained by reason thereof.

Paxton-Eckman Chem. Co. v. Mundell, 45, 52 (5).

FRAUDS, STATUTE OF—

1. *Application.—Parol Gift of Lands.*—A parol gift, or a verbal contract for the sale of land, may be taken out of the operation of the statute of frauds by clear and definite proof of the contract or gift, followed by full possession, use, and control of the land.

Osterhaus v. Creviston, 382, 389 (2).

2. *Guaranty.—Original Promise.*—Where it appeared that defendant contracted to pay for medical services to her son, and that the credit was given to her solely, the agreement was not that of a guarantor but of an original promisor, and was not void under the statute of frauds, though not in writing.

Johnson v. Jones, 4, 5, (1).

3. *Parol Gifts.—Evidence.*—While a parol gift of land, and the facts relied on to take the case out of the statute of frauds, must be clearly established by satisfactory proof yet the evidence need not be of any particular kind or class and the ultimate fact of gift may be inferred from facts and circumstances proven by the evidence, if they are sufficient.

Osterhaus v. Creviston, 382, 389 (3).

GAS—

See MINES AND MINERALS.

GIFTS—

Parol, of lands, statute of frauds, application, see **FRAUDS, STATUTE OF** 1, 3.

Parol, of lands, enforcement, see **SPECIFIC PERFORMANCE**

Parol.—Action.—Sufficiency of Evidence to Establish.—Where, in an action to establish ownership of land claimed by defendants as a parol gift, there was evidence tending to show that the donor said he intended to buy a farm for the defendants and after he bought stated that it was their farm, and it was indisputably established that they took possession and lived thereon continuously, cleared the land, paid the taxes and made permanent improvements, though there was some controversy as to who paid for the same, the evidence was sufficient to establish an absolute gift to defendants and they were entitled to a deed. *Osterhaus v. Creviston*, 382, 390 (5).

GOOD FAITH—

See **BROKERS; PARTNERSHIP** 4.

Of defendant in ejectment action, effect, see **EJECTMENT** 3.

Presumption of, as to city council, see **EVIDENCE** 3.

Of lessee of oil and gas lands, see **MINES AND MINERALS** 1.

GUARANTY—

Distinguished from original promise, see **FRAUDS, STATUTE OF**, 2.

GUARDIAN AND WARD—

Judgment ordering the reform of guardian's final report is not a final judgment from which an appeal will lie, see **APPEAL** 3.

HARMLESS ERROR—

See **APPEAL** 77-83; **TRIAL** 7.

HEALTH—

See **NUISANCE**.

HEIRS—

See **DESCENT AND DISTRIBUTION; PARTITION; WILLS**.

Rights of illegitimate children as, marriage of parents, see **BASTARDS**.

HIGHWAYS—

See **MUNICIPAL CORPORATIONS**.

HUSBAND AND WIFE—

See **DIVORCE; STATUTES; WILLS**.

1. *Acquisition of Title by Wife.—Adverse Possession.*—A woman is not precluded from taking and holding the exclusive possession of land by the mere fact that she is married, though her marital relation is proper to be considered along with other evidence bearing on the question of possession in her.

Hitt et al. v. Carr, 80, 124 (33).

2. *Husband's Debts.—Liability.*—Neither the wife nor her property are liable for the debt of the husband incurred before her decease, and she is under no obligation to make provision that such debt be paid out of her estate.

Studebaker Bros. Mfg. Co. v. DeMoss, 635, 639 (1).

IDEM SONANS—

See NAMES.

ILLEGITIMATE CHILDREN—

Marriage of parents, capacity to inherit, see BASTARDS.

INDEPENDENT CONTRACTORS—

See MASTER AND SERVANT.

INHERITANCE—

Canons of, not contravened by judgment of a justice of the peace, see BASTARDS.

Determinable or qualified fee is an estate of, see ESTATES 1, 2.

INJUNCTION—

See NUISANCE.

Appellate court can not be deprived of jurisdiction in suit for, by the commission of the wrongful act pending appeal, see APPEAL 1.

Where wrongful act has ceased pending appeal, moot question, see APPEAL 58.

By taxpayer to restrain illegal acts of officers, see MUNICIPAL CORPORATIONS 37.

Inefficient Injunction.—Granting.—Where the order of the court could not correct the mischief complained of, an injunction will not be granted.

Terre Haute Paper Co. v. Terre Haute Water Works, 263, 271 (3).

INSPECTION—

Of mines, regulations, see MASTER AND SERVANT.

INSTRUCTIONS—

See TRIAL.

For review of rulings as to, see APPEAL.

INSURANCE—

See CONTRACTS.

1. *Action by Assured.—Repudiation of Contract by Insurer.*—Where an insurer repudiates its contract, refuses to accept premiums thereon and denies liability, the assured cannot treat his policy as in force and effect and still preserve his right to sue for damages for its breach.

Indiana Life Endowment Co. v. Carnithan, 567, 579 (7).

2. *Anticipatory Breach.—Sufficiency of Evidence.*—In an action for damages predicated on an insurer's alleged repudiation of its policy of insurance contracting to pay a death and a total disability benefit, the evidence is insufficient to show the insurer's repudiation of the contract where there is an admission by the assured that the defendant insurance company did not controvert its liability under its policy for permanent disability existing at the time it refused to accept further premiums.

Indiana Life Endowment Co. v. Carnithan, 567, 580 (8).

3. *Anticipatory Breach.—Actions.—Damages.*—Where an insurer repudiates its contract and denies liability thereunder and refuses to receive premiums, the assured may elect either to consider the policy at an end and recover the equitable and just value thereof, or he may institute proceedings to have the policy adjudged to be

INSURANCE—Continued.

in force in which case the question of forfeiture may be determined, or he may tender the premiums and, if acceptance is refused, wait until the policy becomes payable and then test the forfeiture in a proper action on the policy.

Indiana Life Endowment Co. v. Carnithan, 567, 579 (6).

4. *Entire or Severable Contract.*—A mutual life and disability policy of insurance, providing both a death and a total disability benefit, is not a severable contract where one premium is the consideration for both liabilities.

Indiana Life Endowment Co. v. Carnithan, 567, 581 (9).

5. *Issuance of Rider.*—*Waiver.*—Where, in an action to recover on policies of insurance, the evidence showed that the defendant company, with both actual and constructive notice that the assured although prohibited by the policies, used gasoline on his premises, placed riders on such policies by which the insurance originally written was redistributed and new property included, such riders constituted a new policy of insurance within the rule that where an insurer issues a policy of insurance with knowledge of the violation of a prohibitive condition contained therein, the same is waived.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 541 (6).

6. *Knowledge of Company.*—*Waiver.*—*Issuance of Policy.*—*Existing Breach.*—Where an insurance company at the time it issues a policy of insurance, has actual or constructive knowledge of the use of gasoline on the assured's premises, which is prohibited by the policy, the company, by issuing the policy with such knowledge, thereby waives the prohibitive condition therein, and it cannot afterwards avail itself of such condition in its policy in defense of an action to recover thereon.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 540 (5).

7. *Knowledge of Insurer.*—*Action.*—Where, in an action to recover on insurance policies, the defendant interposed the defense that the policies were void because the assured violated a provision contained in the policies forbidding the use of gasoline on his premises, there was sufficient evidence to sustain the finding of the trial court for the plaintiff where it was shown that the insurer had knowledge, both actual and constructive, of the use of gasoline by the assured in his plant, both before and at the time riders redistributing the original insurance and including new property were attached to the policies sued on, the prohibitive clause as to the use of gasoline being, therefore, waived.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 543 (8).

8. *Knowledge of Broker.*—The knowledge of an insurance broker relating to the risk, obtained while acting in the scope of his authority as agent of the insurance company, is binding on the company, though not communicated to it.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 539 (4).

9. *Knowledge of General Agent.*—The knowledge of the general agent of an insurance company of facts material to the risk, such as the assured's use of gasoline contrary to the provisions of the policy, will be imputed to the company.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 538 (3).

10. *Usage of Business Insured.*—*Presumption.*—An insurance company is charged with the duty of informing itself as to the usages of the particular business insured, and it will be presumed that the company has such knowledge.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 542 (7).

TIME—Continued.

Perfection of Appeal.—Time.—Statute.—Where appellants filed their transcript on appeal on the sixty-first day after the filing of the appeal bond, the preceding day being Sunday, it was filed in time, since §1350 Burns 1914, §1280 R. S. 1881, concerning the computation of time in such cases, provides that if the last day falls on Sunday it shall be excluded.

Crouch v. Shantz, 476, 478 (1).

TITLE—

See **WILLS**.

Color of, what constitutes, see **ADVERSE POSSESSION 2-11**.

Claim of, what constitutes, see **ADVERSE POSSESSION 3, 4**.

TRANSCRIPTS—

See **APPEAL; EVIDENCE; JUDGMENT 2; TIME**.

TRIAL.

- | | |
|--------------------------------|-----------------------------|
| I. RECEPTION OF EVIDENCE, 1-3. | V. VERDICT, |
| II. TAKING CASE FROM JURY, 4. | (a) GENERAL, 11-15. |
| III. INSTRUCTIONS, 5-9. | (b) SPECIAL, 16-21. |
| IV. DELIBERATIONS OF JURY, 10. | VI. TRIAL BY COURT, 22, 23. |

For review of rulings at, see **APPEAL**.

I. RECEPTION OF EVIDENCE.

- Admissibility.—Evidence Not Competent as to all Parties.*—There is no reversible error in excluding evidence offered jointly in behalf of several parties, where it is incompetent as to some of them, nor in admitting it, if competent as to some, but in the latter case its application and effect must be limited by the trial court, and failure to do so on request of one against whom it is not competent would be reversible error. *Hitt et al. v. Carr*, 80, 94 (7).
- Admissibility.—Evidence Not Competent as to all Parties.*—Where evidence as to transactions between plaintiff and the donor of land to which plaintiff sought to have title quieted was otherwise admissible, plaintiff was not incompetent to testify under §522 Burns 1914, §499 R. S. 1881, by reason of the mere fact that one of the defendants claimed an undivided interest by inheritance, since, if the testimony of plaintiff was incompetent as to such defendant, it would have been the duty of the court to admit it and limit its application by instructions to the jury. *Hitt et al. v. Carr*, 80, 121 (28).
- Admissibility.—Evidence Not Competent as to all Parties.*—Where evidence is competent in behalf of some, and incompetent as to other, joint parties, it should be offered in behalf of those in whose favor it is competent, and when so offered should be received and considered so far as competent. *Hitt et al. v. Carr*, 80, 94 (8).

II. TAKING CASE FROM JURY.

See **EJECTMENT 1**.

- Peremptory Instruction.*—The right to direct a verdict for defendant can only be upheld where the evidence is clearly insufficient to establish one or more facts essential to plaintiff's cause of action. *Ault v. Clark*, 55, 59 (2).

TRIAL—Continued.

III. INSTRUCTIONS.

In ejectment proceedings against a railroad company, an instruction that neither party could recover, without establishing a fee-simple title, was erroneous, the company alleging rights to only a right of way.
Vandalia R. Co. v. Topping, 657, 665 (5).

5. *Action for Injuries*.—An instruction as to what might be considered in determining whether plaintiff's decedent was guilty of any "material" negligence in attempting to cross a railroad bridge under the circumstances disclosed by the evidence is not erroneous on the ground that the word "material" left to the jury the question as to what degree, quality or extent of negligence they would regard as material.

Terre Haute, etc., Traction Co. v. Hunter, 399, 419 (12).

6. *Conformity to Evidence*.—Instructions are erroneous which authorize a recovery on theories not supported by the evidence.

New York, etc., R. Co. v. Allen, 391, 396 (6).

7. *Harmless Error*.—*Inapt Words*.—*Cure by Other Instructions*.—While the use of the word "pecuniary" in connection with the words "loss" and "compensation" in an instruction on damages in a personal injury case is inapt and subject to criticism, yet the giving of the instruction so worded, in connection with another instruction accurately stating the elements of damage to be considered without referring to pecuniary loss, is not reversible error, since viewing the instructions together, the jury could not have been misled as to the elements of damage by the use of the word pecuniary in the instruction complained of. *Pence v. Pence*, 679, 683 (2).

8. *How Construed*.—In determining whether there was error in the giving or refusing to give instructions, the instructions given must be considered as a whole.

Merchants Nat. Bank v. Nees, 290, 296 (3).

9. *Repetition*.—It is proper for the trial court to refuse to give tendered instructions when, to the extent that they are correct and applicable to the issues, they are included in substance in those given.

Deep Vein Coal Co. v. Rainey, 608, 625 (10).

IV. DELIBERATIONS OF JURY.

10. *Consideration of Interrogatories*.—The jury may properly consider the interrogatories either before or after the general verdict has been agreed on, or during the deliberations respecting the same, as the jury itself may determine.

Deep Vein Coal Co. v. Rainey, 608, 628 (13).

V. VERDICT.

(A) GENERAL VERDICT.

11. *Answer to Interrogatories*.—It is the duty of the court to reconcile the answers to special interrogatories with the general verdict if possible, and the court should consider all of the interrogatories and answers together, in connection with any and all facts favorable to the general verdict that might have been legally proven under the issues, and if, when so considered, there is a reasonable possibility of reconciliation between such answers and the general verdict, the latter must stand.

Lake Erie, etc., R. Co. v. McConkey, 447, 453 (5).

12. *Effect*.—A general verdict is a finding for the party in whose favor it is rendered on all the material issues involved in the action.

Harker v. Gruhl, 177, 180 (2).

TRIAL—Continued.

13. *Effect of.*—Where, in an action for damages, the issue was presented by the filing of an affirmative answer to which there was a reply of general denial, the general verdict for the plaintiff is a finding in favor of the averments of the complaint and against those of the affirmative answer that are in conflict with the former.
Lake Erie, etc., R. Co. v. McConkey, 447, 452 (4).
14. *Control by Special Verdicts.*—The answers to interrogatories control the general verdict only when the conflict upon the face of the record is such as to be beyond the possibility of being removed by any evidence admissible under the issues in the cause.
Harker v. Gruhl, 177, 180 (3).
15. *Issues.*—In an action against an interurban railroad for the death of a passenger killed while attempting to walk back along the tracks to his destination past which he had been negligently carried, where the jury answered negatively an interrogatory as to whether the motorman did all within his power to prevent the accident after discovering decedent on the tracks, the general verdict for the plaintiff could stand as resting on a paragraph of complaint based on the theory of last clear chance.
Terre Haute, etc., Traction Co. v. Hunter, 399, 419 (10).

(B) SPECIAL VERDICTS.

16. *Answers to Interrogatories.—Motion for Judgment.—Matters Considered.*—In determining the correctness of the ruling on a motion for judgment on the answers to interrogatories the court looks alone to such answers, the pleadings and the general verdict, every presumption being in favor of the general verdict, and the answer to the interrogatories will prevail over it only when the conflict between the two is such that no evidence possible under the issues could reconcile them; and, where the answers relied on are contradictory and inconsistent, they will not control the general verdict.
Williams v. Lowe, 357, 361 (5).
17. *Answers to Interrogatories.—Conflict.*—In an action to collect money on a check dishonored because of the insolvency of the bank upon which it was drawn, the answers of the jury to the special interrogatories relied on to overturn the general verdict disclosed, substantially, that the defendant, as attorney for the plaintiff, collected a sum of money due plaintiff; that he deposited the money in the bank in his own name; and that he received nothing in consideration of the execution of the check sued upon, which was given to plaintiff in payment of the money collected by defendant. *Held*, that, as the answers are in legal effect contradictory and inconsistent, the general verdict should prevail.
Williams v. Lowe, 357, 363 (6).
18. *Form of Interrogatories.—Conclusion.*—In an action against a carrier for injury caused by plaintiff being struck by a freight truck, and an interrogatory requiring the jury to answer as to whether the act of another person in climbing upon a truck, causing it to fall against the plaintiff "was the immediate and proximate cause of the plaintiff's injury" was improper, since it calls for an answer involving the legal definition of the term "proximate cause", and hence calls for a conclusion.
Lake Erie, etc., R. Co. v. McConkey, 447, 456 (8).
19. *Motion for Judgment on Interrogatories.—Answers in Conflict.*—There is no error in overruling a motion for judgment on the answers to special interrogatories where such answers are conflicting and inconsistent.
Williams v. Lowe, 357, 364 (8).

APPEAL—Continued.

35. *Review.—Judgment.*—An assignment of error that the trial court erred in rendering judgment for or against a party presents no question for review. *Shull v. Dunten*, 602, 605 (3).
36. *Review.—Memoranda of Demurrer.*—No question is presented for review by an assignment of error predicated on the action of the trial court in overruling appellant's demurrers where there is a failure to set forth in the briefs the memoranda filed with the demurrers. *McGee v. Stockton*, 555, 556 (1).
37. *Review.—Requisites.*—The assignment of error, to be sufficient as to any particular error attempted to be presented for review, must present to the appellate tribunal the precise question which was presented to the lower court for its decision. *Helms v. Cook*, 629, 631 (1).
38. *Review.—Specification of Errors.*—Where appellant's first and second assigned errors set forth that the trial court erred in sustaining appellee's demurrers to the first and second paragraphs of answer "to appellee's complaint" no question is presented the appellate court for review by such assigned errors, because the record does not disclose any ruling to which such assignments are applicable, since the first paragraph of answer was addressed to the first paragraph of complaint and the second paragraph of answer was addressed to the second paragraph of complaint. *Williams v. Lowe*, 357, 360 (1).

IX. BRIEFS.

39. *Appellee's Failure to File.*—Where the appellee fails to file briefs the Supreme and Appellate Courts, may in their discretion, deem such failure as a confession of the errors assigned by appellant. *Keeley v. Bradford*, 683, 684 (1).
40. *Appellee's Failure to File.—When Confession of Error.*—The appellee's failure to file briefs will not be deemed a confession of error when no error is, in fact, presented by appellants' briefs. *Keeley v. Bradford*, 683, 685 (3).
41. *Assignment of Errors.—Waiver of Errors.*—Such of the assigned errors as are not presented by the appellant's brief will be deemed to have been waived. *Lake Erie, etc., R. Co. v. McConkey*, 447, 449 (1).
42. *Grounds of Review.—Ruling on Motion for New Trial.*—Where the only reference to the ruling on the motion for a new trial in appellant's points and authorities is a statement that "there were rulings on certain instructions referred to in the new trial as to the time when a sale in the case was effected and under that head the following authorities are cited," followed by a statement of two separate propositions of law and citation of authorities in support thereof, presents no question on the ruling on such motion. *Nave v. Powell*, 274, 277 (2).
43. *Insufficiency.—Dismissal.*—Where appellant's briefs do not set out enough of the record to present the questions relied on for reversal they fail to comply with Rule 22, cl. 5, of the Supreme and Appellate Courts, and the appeal will be dismissed. *Keeley v. Bradford*, 683, 685 (4).
44. *Insufficiency.*—Appellant's brief, containing no statement of the errors assigned or relied on for reversal, no statement of the record showing any error or exception relied on, and no statement of the issues or decision, wholly failed to comply with Rule 22, and no question was presented thereby. *Joseph v. Horodesky*, 1.

APPEAL—Continued.

45. *Presentation of Error.—Review.*—Where the "Points and Authorities" in appellant's brief present no question of conflict between the answers to special interrogatories and the general verdict nor any question as to error in overruling the motion for a new trial, except the giving and refusal of certain instructions, the court will consider no other which might arise under the overruling of the motion. *Terre Haute, etc., Traction Co. v. Hunter*, 399, 419 (11).
46. *Questions Presented.*—Where appellant's brief fails to comply with Rule 22, clause 5, of the Supreme and Appellate Courts requiring "a concise statement of so much of the record as presents every error and exception relied on," but does set out the motion for a new trial, containing the grounds assigned therefor, and under the "Points and Authorities" the brief states several abstract propositions of law without attempting to apply them, as the rule of the court provides, to any particular ruling of the trial court, except to state that the decision of the court is not sustained by sufficient evidence, the sufficiency of the evidence is the only question presented for consideration. *Robinson v. Horner*, 456, 458 (1).
47. *Reference to Assignment of Error.—Specification.*—Where appellant, in his brief, fails to make specific reference to any assigned error and makes no attempt to apply his propositions of law to any assigned error, except in one instance, the other assigned errors are waived. *Nave v. Powell*, 274, 277 (1).
48. *Requisites in General.*—The brief must indicate such of the assigned errors as are relied on for reversal as provided in Rule 22, cl. 4, of the Supreme and Appellate Courts, and should contain enough of the record and references thereto to present the ruling upon which each respective error relied on for reversal is predicated, and, where several errors are relied on, the requirement of the rules of the court is not met by a statement in appellant's brief of general propositions of law and a citation of authorities thereunder unless such brief indicates the error to which appellant seeks to apply his proposition of law and authorities. *Kaiser v. Willekindt*, 171, 174 (3).
49. *Review.—Specification of Errors.*—Where appellant's brief, in its points and authorities, states several propositions of law, none of which are applied to any particular ruling of the trial court or to any assigned error, there is a failure to comply with the rules of the Supreme and Appellate Courts and no question is presented on appeal. *Warner v. Reed*, 544, 547 (1).
50. *Review.—Specifications of Error.*—The court is warranted in refusing to consider instructions where the criticism to the giving or refusing to give such instructions is very general and by abstract propositions of law. *Merchants Nat. Bank v. Nees*, 290, 296 (2).
51. *Specification of Errors.*—Under a rule of court that the appellant's brief shall contain a concise statement of so much of the record as fully presents every exception and error relied upon, failure to set out a motion for change of venue from the judge, the demurrer and memorandum, and a motion for a new trial, or the substance of either, will amount to a waiver, on appeal, of such assignments of error. *Graves v. Kelly*, 164, 166 (1).
52. *Specifications of Error.*—Where appellant's brief, in its points and authorities, fails to direct any proposition to the overruling of the motion in arrest of judgment and the same is not otherwise discussed, no question as to the alleged error is presented to the court for its consideration. *Merchants Nat. Bank v. Nees*, 290, 297 (4).

APPEAL—Continued.

53. *Waiver of Assigned Errors.*—Such assigned errors as are not mentioned or referred to in the points and authorities in appellant's brief are waived.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 531 (1).

X. DISMISSAL.

54. *By Court on Own Motion.*—The appellate court will dismiss a cause on its own motion where the parties necessary to a complete determination of the action are not brought into court.

Gladieux v. Johns, 338, 342 (3).

55. *Notice of Appeal.—Effect of Failure to Give.*—Under Rule 36 of the Supreme and Appellate Courts, a vacation appeal will be dismissed when the cause has been on the docket for ninety days or more without an appearance by the appellee where there has been no effort to perfect the appeal nor any steps taken to bring the appellee into court further than to serve him with an invalid and ineffectual notice of appeal.

Walker v. Johnson, 550, 554 (3).

XI. HEARING AND REHEARING.

56. *Scope.*—Where appellant's brief in the original appeal did not contend that an answer held not good as a plea of fraud was sufficient as an answer of failure of consideration, such question can not be presented for the first time in the petition for a rehearing.

Merchants Nat. Bank v. Nees, 290, 310 (18).

XII. REVIEW.**(A) SCOPE AND EXTENT.**

57. *Evidence.*—On appeal, the error urged by appellant being the action of the trial court in giving an instruction which took the question of contributory negligence away from the jury, the court can consider only the evidence that tends to show contributory negligence, as it is never the province of the court to weigh conflicting evidence.

City of Indianapolis v. Pell, 191, 194 (1).

58. *Moot Question.*—Where an injunction was sought, but pending an appeal from a judgment for defendant the acts complained of had ceased, the question of whether the injunction should be granted became a moot question, not to be further considered.

Miller v. Gates, 37, 41 (2).

59. *Motion for Judgment on Interrogatories.*—Where, on appeal, the error relied on for reversal is the failure of the trial court to render judgment on the answers to interrogatories, the scope of the review is limited to the complaint, answer, the general verdict, and the interrogatories and the answers thereto.

Harker v. Gruhl, 177, 180 (1).

60. *Peremptory Instruction.—Reasons for Giving.*—Where the giving of a peremptory instruction was proper, the reasons of the court for its giving, set forth therein, were immaterial and did not affect it.

Ault v. Clark, 55, 64 (8).

61. *Rulings on Evidence.—Objections.*—On the overruling of an objection to evidence by the trial court, only the grounds of objection presented to the trial court will be considered on appeal; but if the objection is sustained or the evidence excluded, the ruling will be sustained on appeal unless the appellant shows it was wrong on any theory, and the appellee may avail himself of any valid objection to the testimony as offered.

Hill et al. v. Carr, 80, 93 (6).

APPEAL—Continued.

(B) PRESUMPTIONS.

As to authority of attorney to file brief, see ATTORNEY AND CLIENT.

62. *Burden of Showing Error*.—On appeal the burden is on the appealing party to present to the court the errors relied upon for reversal. *Kaiser v. Willekindt*, 171, 174 (1).
63. *Burden of Showing Error*.—The appellate tribunal will presume that the judgment of the trial court is correct, and on appeal the burden is on the appellant to properly present error which will entitle him to a reversal. *Keeley v. Bradford*, 683, 684 (2).
64. *Evidence—Sufficiency*.—The court, on appeal, is bound to view the evidence in the light most favorable to the party successful below in considering the question of the sufficiency of the evidence to sustain the verdict. *Smith v. Fiscus*, 156, 161 (4).
65. *Motion for Judgment on Interrogatories—General Verdict*.—In determining whether error was committed in overruling the motion for judgment on the answers to interrogatories, the court will assume in favor of the general verdict that every supposable fact legally admissible under the issues was proven in support of such verdict. *Lake Erie, etc., R. Co. v. McConkey*, 447, 450 (3).
66. *Verdict—Evidence—Sufficiency*.—In determining, on appeal, the sufficiency of the evidence to support a general verdict for the plaintiff, the court must look to the evidence most favorable to him. *Indiana Life Endowment Co. v. Carnithan*, 567, 576 (3).

(C) QUESTIONS OF FACT, VERDICTS AND FINDINGS.

67. *Conflicting Evidence*.—It is not the province of the court to weigh conflicting evidence. *Koehler v. Haller*, 8, 14 (4).
68. *Conflicting Evidence*.—Where the jury's verdict is supported by some evidence on every material fact involved, the appellate tribunal will not weigh conflicting testimony. *Pence v. Pence*, 679, 682 (1).
69. *Conflicting Evidence*.—While §698 Burns 1914, Acts 1903 p. 341 requires the Supreme and Appellate Courts to consider and weigh the evidence, if required by the assignment of errors, yet, where the evidence is in part oral and there is a conflict therein, it will not be weighed by the reviewing court. *Robinson v. Horner*, 456, 459 (2).
70. *Evidence—Sufficiency*.—Where there was some evidence to support the verdict, it could not be disturbed on the ground of insufficient evidence, although the evidence was conflicting in some respects. *Indiana Quarries Co. v. Smallwood*, 33, 36 (4).
71. *Partition by Parol—Conflict of Evidence*.—Where there is a conflict in the oral evidence as to the effect and extent of a parol agreement for partition the decision of the trial court upon such question is final, and it is not reviewable upon appeal. *Murray v. Murray*, 132, 142 (1).
72. *Sufficiency of Evidence*.—Where appellants, who were plaintiffs below, seek a reversal of a decision of the trial court on the ground that such decision was not sustained by sufficient evidence, to entitle appellants to such reversal, the burden is upon them to show that there was undisputed evidence before the trial court in support of every element essential to the cause of action stated in the complaint, and that such evidence as to each of such elements was susceptible to but one conclusion, that is, that such element had been proven. *Kaiser v. Willekindt*, 171, 175 (4).

APPEAL—Continued.

73. *Sufficiency of Evidence.*—Where there is any evidence fairly tending to support each of the elements necessary to sustain the decision of the trial court, the case will not be reversed for insufficiency of the evidence.

The Globe, etc., Ins. Co. v. Indiana Reduction Co., 528, 534 (2).

74. *Sufficiency of Evidence to Support Verdict.*—Where there was a general verdict for plaintiffs, who were interstate shippers, the complaint averred that the defendant, a common carrier, had been negligent in delaying the shipment of a consignment of live stock, such delay resulting in loss to plaintiffs, and the defendants set up as a defense that the consignment had been shipped under a special contract limiting the liability of the carrier, such contract providing for the lower of two freight rates, such rate having been promulgated in compliance with the provisions of the federal interstate commerce law. Defendants also answered that plaintiffs had failed to present their verified claims for damages within the time stipulated in the contract. There was evidence tending to prove, though not conclusively, that plaintiffs were compelled to sign the special contract set up as a defense in order to secure the shipment of their freight; that defendant's agent would not move the cars until such contract was signed; and that the plaintiffs were not given the right to make their option as to which of the two published rates they would ship under. *Held*, that, as the general verdict finds every material fact in favor of the plaintiffs, and there is some evidence from which the inferences necessary to support the verdict might reasonably have been drawn, the verdict will not be disturbed on the ground that it is not sustained by the evidence, although other and different inferences of fact might reasonably have been drawn therefrom. *Toledo, etc., R. Co. v. Milner*, 208, 218 (7).

75. *Verdict.—Evidence.—Sufficiency.*—Where, in an action for damages predicated on an alleged repudiation of a contract of insurance by the insurer, the evidence shows that the assured, the plaintiff below, elected, at the time of such alleged repudiation, to treat the contract as still in force for the recovery of benefits thereunder, a verdict for the plaintiff is not sustained by sufficient evidence. *Indiana Life Endowment Co. v. Carnihan*, 567, 585 (11).

76. *Verdict.—Conclusiveness.*—Although the evidence is conflicting, if there is no failure of evidence, a verdict based thereon is conclusive, since the court on appeal cannot weigh or ignore evidence.

Hitt et al. v. Carr, 80, 124 (34).

(D) HARMLESS ERROR.

77. *Admissibility of Evidence.*—Where, in an action for goods sold and delivered, there was filed with the complaint, as an exhibit, what purported to be a duplicate of the order for the goods, the error, if any, in admitting the duplicate in evidence without proof of its execution was cured by the admission in defendant's deposition that the exhibit was a correct copy of the order and by the introduction of the original order.

Coca Cola Bottling Co. v. International Filter Co., 421, 423 (1).

78. *Demurrer to Answer.*—The sustaining of a demurrer to a third paragraph of answer, which was merely an argumentative denial, was harmless in view of the record showing an answer in general denial. *Harris v. International, etc., Constr. Co.*, 64, 72 (3).

79. *Overruling Demurrer.*—Where, in an action on notes the execution of which was admitted, the defendants pleaded two paragraphs of answer, one based on a breach of the warranty and the other based on fraud, the latter being held insufficient, and there was a

APPEAL—Continued.

verdict for the defendants, the overruling of the demurrer to the bad paragraph of answer can not be regarded as harmless, as there was nothing to show on which paragraph of answer the verdict of the jury was based.

Merchants Nat. Bank v. Nees, 290, 306 (13).

80. *Refusal of Instruction.*—In an action against the lessee of a coal mine for the death of an employe, the error, if any, of the trial court in refusing to give an instruction that the jury might consider the interrogatories either before or after they had agreed on the general verdict was harmless, where the interrogatories called for facts concerning but a single branch of the case and the answers were substantially in harmony with the facts as claimed by the defendant.

Deep Vein Coal Co. v. Rainey, 608, 628 (14).

81. *Ruling on Demurrer.*—Where it appeared that the facts found and conclusions of law stated rested upon a good paragraph of complaint, the action of the trial court in overruling the demurrer to another paragraph was harmless even if erroneous.

Harris v. International, etc., Constr. Co., 64, 66 (1).

82. *Ruling on Motion to Dismiss.*—It was not error for the trial court to overrule a motion to dismiss as to two of the defendants named in the original complaint when, before the filing of the motion, an amended complaint was filed which did not make such defendants parties.

Hopkins v. Matters, 676, 678 (2).

83. *Ruling on Pleadings.*—Error, if any, predicated on the action of the trial court in overruling a motion to require plaintiff to elect to go to trial upon either the first and third paragraphs of his complaint, or upon the second paragraph, was rendered harmless by plaintiff's dismissal of the first and second paragraphs of his complaint before the submission of the case to the jury.

Indiana Life Endowment Co. v. Carnithan, 567, 574 (1).

(E) DECISIONS OF INTERMEDIATE COURTS.

84. *Defective Transcript.*—In a proceeding to annex land to a town, an appeal from the finding of the board of county commissioners was taken by the petitioners, who filed an appeal bond with the county auditor who failed to properly certify a transcript of the proceedings with the clerk of the circuit court, but, in the court below, where defects in the transcript might have been urged on motion of either party, there was no objection made to its insufficiency and a trial was had on the merits of the cause with the full appearance of all the parties. Held that, under the facts in the case, the failure of the auditor to properly certify the transcript is not ground for reversal, especially as there had been no objection made to the form of the transcript until an appeal was taken to the appellate court.

Patterson v. Town of Ft. Branch, 333, 336 (2).

(F) SUBSEQUENT APPEALS.

85. *Effect of Decision in Prior Appeal.*—"Law of the Case."—Where, on a prior appeal of a cause, the decision of the court determined the construction of a written contract of warranty of a stallion and decided that the remedy provided therein was exclusive and must be so treated in the consideration of any pleading based thereon or involving the construction thereof, such decision is the law of the case in so far as any question concerning the construction of such contract of warranty, or any pleading based thereon, is concerned.

Nave v. Powell, 274, 282 (4).

APPEAL—Continued.

86. *Effect of Decision on Prior Appeal.*—"Law of the Case."—Where no substantial changes are made in pleadings by amendment thereto, the only amendment to the complaint being as to the amount of attorney's fees, the decision in a prior appeal, in so far as the pleadings are concerned, must be considered as the law of the case, but this is not true, however, if the theory of the pleading or any material averment thereof is changed by amendment so as to present an essentially different question of law.

Nave v. Powell, 274, 279 (3).

XIII. DETERMINATION AND DISPOSITION OF CAUSE.**(A) REVERSAL.**

87. *Insufficiency of Evidence.—Burden of Proof.*—Where, in an action for damages, it was alleged in the complaint that defendants contracted with the plaintiffs to furnish them a specified number of half beer barrels of the standard gauge and measurement as required by the United States government, and that the half barrels as furnished were larger than the regulation size resulting in damage to the plaintiff by reason of the excess beer placed therein, expense of recoopering, etc., and there was no evidence of any government law fixing any standard gauge for half barrels, nor was there any conclusive evidence that the half barrels furnished did not meet the contract requirement as to size, or that such half barrels holding an excess quantity were identified as those furnished by defendants, *held*, that appellant has not sustained his burden of showing that the decision of the trial court for the defendant was not sustained by sufficient evidence.

Kaiser v. Wittekindt, 171, 176 (5).

88. *Ruling on Demurrer.—When Grounds.*—Under the provisions of §350 Burns 1914, §345 R. S. 1881, no objection taken by demurrer, and overruled, is sufficient to reverse the judgment if it appears from the whole record that the merits of the cause have been fairly determined.

Brown v. Young, 364, 375 (6).

APPELLATE COURT—

See **APPEAL**; **TRIAL**.

APPEARANCE—

On appeal, brief as constituting, see **APPEAL** 20.

"ARGUMENT"—

Usage of, for memoranda, effect, see **PLEADING** 11.

ARGUMENT OF COUNSEL—

Refusal of proper party to open and close, how presented for review, see **APPEAL** 15.

ASSIGNMENT OF ERRORS—

See **APPEAL**.

ATTORNEY AND CLIENT—

Notice of appeal, service on attorney, when ineffectual, see **APPEAL** 21, 22.

Fees in divorce cases, allowance, see **DIVORCE** 2; in partition proceedings, see **PARTITION** 1.

ATTORNEY AND CLIENT—Continued.

Authority of Attorney.—Presumption.—A member of the firm of attorneys which represented all party plaintiffs below, and who filed the confession of error on behalf of appellee plaintiffs, made an affidavit in support of the petition for rehearing and the motion to modify the appellate court's mandate, in which affidavit he set up that his firm took no part in the prosecution of the appeal after the filing of such confession of errors, but did not state that the attorneys who filed the reply brief in behalf of appellees did not have authority to do so. *Held*, that in the absence of such a showing the attorneys will be presumed to have had the requisite authority to file the brief for appellees.

Almeier v. Adams, 219, 261 (16).

AUTOMOBILES—

Use of streets, see MUNICIPAL CORPORATIONS 24-28; NEGLIGENCE.

BANKS AND BANKING—

See **BILLS AND NOTES; PRINCIPAL AND AGENT.**

BASTARDS—

1. *Inheritance.—Statute.*—Where plaintiff's mother instituted paternity proceedings before a justice of the peace and obtained a judgment that the defendant therein was plaintiff's father, and the mother subsequently married another who took plaintiff into his family, acknowledging her as his own child, she was thereby legitimized and had the same inheritable capacity as the legitimate children of such marriage, since the judgment rendered by the justice of the peace cannot be held to contravene the canons of inheritance as expressed in §3001 Burns 1914, §2476 R. S. 1881, which provides that where a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed to be legitimate. *Tieben v. Hapner*, 650, 654 (2).

2. *Acknowledgment.—Inheritance.—Legislative Power.—Statute.*—Section 3000 Burns 1914, §2476 R. S. 1881, providing that where a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed legitimate, is a proper exercise of the unlimited power of the legislature to prescribe the canons of inheritance, and such statute is effective in declaring that an illegitimate child coming within its provisions shall have the inheritable capacity of a legitimate child.

Tieben v. Hapner, 650, 653 (1).

BENEFITS—

Accepting, of judgment necessitates dismissal of appeal, see **APPEAL** 4, 75.

Accepting, of fraudulent transaction as constituting conspiracy, see **CONSPIRACY.**

BILLS AND NOTES—

See **PRINCIPAL AND AGENT.**

1. *Bank Check.—Liability of Drawer or Signer.*—A check is a written contract for the payment of money and the drawer or signer of the bill by the act of drawing and delivery becomes bound to pay if the acceptor does not. *Williams v. Lowe*, 357, 360 (3).

2. *Bank Checks.—Notice of Dishonor.—Delay.—Answer.—Sufficiency.—Discharge of Endorser.*—In a suit against an endorser to enforce collections of checks dishonored by the bank, an answer, interposing as a defense that notice of the dishonor of the checks



BILLS AND NOTES—Continued.

and the time is so extended, such promise constitutes a new, enforceable contract, though the maker may have had a good defense to such note before the agreement to extend was made.

Merchants Nat. Bank v. Nees, 290, 307 (14).

BOARD OF COMMISSIONERS—

See APPEAL 84; COUNTIES; MUNICIPAL CORPORATIONS.

BONDS—

See APPEAL; PLEADING 9.

BOUNDARIES—

An instrument or survey may give color of title to land where boundaries and the extent thereof can be ascertained therefrom, see ADVERSE POSSESSION 6.

BRIEFS—

See APPEAL 36, 39-53.

BROKERS—

Real Estate Brokers.—Fraud.—Liability.—Where it appears from the evidence that one of the appellants, a real estate broker, entered into a contract with the appellees to sell their land and did negotiate a sale of such land, but represented to appellees that he could secure a price for their land much less than that actually received and, by means of a conveyance to an associate, who then conveyed the land to the real purchaser, defrauded the appellees of a large part of the purchase money, which money so fraudulently obtained was divided between himself and coappellants, *held*, that even if no actual fraud were shown, the conduct of such broker would amount to constructive fraud, as the contract to sell the real estate for appellees created a fiduciary relation which cast upon him the duty of acting in the utmost good faith.

Smith v. Fiscus, 156, 159 (1).

BURDEN OF PROOF—

See EVIDENCE; PLEADING 13.

In action against interstate carrier, where special contract is interposed as defense, see CARRIERS 1-4.

CANCELLATION OF INSTRUMENTS—

1. *Complaint.—Damages.—Allegation of.*—In an action to set aside a contract for the sale of real estate and deeds made pursuant thereto as fraudulent and void, the complaint is not fatally defective for failure to allege specifically the value of the real estate conveyed and the consequent damages, where there is an averment that nothing of value was received by the plaintiff as a consideration for executing the deeds to the realty involved, and it is clearly shown by the allegations that all the parties treated the realty as of value, the reasonable inference to be drawn from such averments being that damage resulted. *Brown v. Young*, 364, 372 (1).

2. *Complaint.—Statu Quo.*—In an action to set aside deeds as fraudulent, the complaint is not fatally defective for failure to allege therein that the defendants had been placed in *statu quo* where there are averments showing that the plaintiff received nothing of value as a consideration for the execution of the deeds involved in the action.

Brown v. Young, 364, 373 (2).

